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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN,

Petitioner,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a judgment of that Court of December 16, 1946.

Opinions Below

The opinion of the District Court for the District of Columbia (R. 62-71) is reported at 65 F. Supp. 25. The Court of Appeals for the District of Columbia affirmed the judgment on December 16, 1946 (R. 77). Its opinion (R. 73-76) is as yet unreported.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is based upon the Judicial Code, Section 240(a), 28 U. S. C. Section 347(a).

Statement of Facts

Petitioner, a natural born citizen of the United States, was employed continuously for nine years in Washington, D. C., by various agencies of the United States Government in different capacities (R. 28). Commencing in 1935, as a research assistant in the Federal Works Agency at $2,000 per year, petitioner advanced in positions of increased responsibility in that agency (R. 29). In 1942 he joined the staff of the Office for Emergency Management and later the War Manpower Commission, whose functions have since been transferred to the Department of Labor (Exec. Order No. 9617, Sept. 17, 1945, 10 F. R. 11929). By 1944, at the time of the termination of employment complained of herein, he was chief of the Classification Division of the War Manpower Commission, responsible for assuring that the positions of the employees of that Commission were properly allocated in accordance with various salary classification statutes (R. 30). During the entire course of his nine years of Government employment, petitioner performed highly satisfactory services and was at all times rated "very good" or "excellent" in the efficiency ratings required by law (R. 28-30). During the pendency of the Civil Service Commission proceedings leading to his dismissal, the two agencies for which he worked repeatedly and firmly opposed his discharge (R. 31-33, 38).

Effective as of September 12, 1944, petitioner was discharged from his position with the War Manpower Commission at the direction of the Civil Service Commission (R. 31). The reasons which the Civil Service Commission

offered to support its direction are stated in the following letter (R. 34-35):

"UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C.

File BAR:JFE:GD

June 5, 1944

Mr. Morton Friedman
c/o Personnel Office
War Manpower Commission
Washington, D. C.

My dear Mr. Friedman:

Reference is made to your appearance before the Commission on April 19, 1944, in further prosecution of your appeal from the finding of ineligibility for continuance in the service.

The Commission has given most careful consideration to your case including the information developed during the course of the investigations which were made and the testimony before the Board of Appeals and Review at the hearing which was accorded you. Particular attention, however, has been given to your statements and based upon those statements the Commission has concluded that the finding of ineligibility was in accordance with the standards applied in such cases and therefore has affirmed the previous action.

The Commission's action was based mainly on your activities in connection with the American Peace Mobilization and your shift in attitude and point of view following the declaration of war between Germany and Russia. It may be true that many members of the American Peace Mobilization were not aware that it was Communist-dominated and pro-Communist but it is generally recognized that those who were prominently and actively affiliated with that organization were people who over a period of time had shown sympathy with the Communist cause. Your testimony was that you were sent to the first meeting of the American Peace Mobilization in Chicago as a representative of your local union; that you also were sent to a meeting of the organization in New York City as a delegate, and that you participated actively in their meetings and

affairs. You also testified that you were active in the affairs of the Washington Peace Mobilization and served on several of its committees.

You were admittedly opposed to the United States participation in war before the invasion of Russia by Germany but thereafter you changed your mind and were of the opinion that this country should fight along with the other United Nations. Just how long it was before Pearl Harbor that you changed your mind is not definitely established, but on the occasion of your appearance before the Commission you indicated that it was probably in August of 1941, which obviously was soon after June 22, 1941.

These matters, together with other activities which have been personally discussed with you, are convincing to the Commission that you are not eligible for retention in the service according to the standards observed by the Commission.

By direction of the Commission:

Very respectfully,

s/ WM. C. HULL
Executive Assistant."

In short, because of petitioner's views concerning the proper course for his country to follow with respect to a war in which it was not yet engaged, and because petitioner participated actively in an organization which held those views, the Civil Service Commission declared him ineligible for Government service. The characterization of the organization as "Communist-dominated or pro-Communist" and the inference that those active in the organization were people who "had shown sympathy with the Communist cause" must be considered in the light of the fact that no charge or finding was made that petitioner was a member of the Communist Party; or that he advocated the overthrow of the Government of the United States; or that he belonged to any organization which advocated the overthrow of the Government of the United States. Section 9A(1) of the Hatch Act is the statute which forbids the

employment of persons having membership in organizations advocating the overthrow of the Government,[1] and the Government in its answer specifically "admit[s] that * * * petitioner * * * was not charged with having violated any of the provisions of the Hatch Act" (R. 23, Par. 9). Nor did the Civil Service Commission charge that the American Peace Mobilization was an unlawful organization, or that espousal of its views constituted an unlawful act. Indeed, the somewhat dubious source of the Commission's views concerning the character of that organization attributes to it a membership of 14,000,000 persons.[2]

Efforts of Petitioner's Employing Agencies to Retain Him

The action of the Civil Service Commission in directing petitioner's discharge culminated more than eighteen months of sharp disagreement over petitioner's eligibility not only between that Commission and the two Government agencies for which petitioner worked, but also within the Commission itself. The following events marked this dispute.

In or about October, 1942, while petitioner was employed by the Office for Emergency Management, the Civil Service Commission directed that Office to terminate his services (R. 31). That Office reviewed the Commission's charges,

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[1] The full text of Section 9A(1) is as follows:

> "It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." 53 Stat. 1148, 18 U. S. C. § 61(i)(1).

[2] See Special Committee on Un-American Activities, House of Representatives, 78th Cong. 2d Sess., *Investigation of Un-American Propaganda Activities in the United States* (Vol. 17, pp. 10282-10284).

as well as the findings resulting from an extensive investigation conducted by its own investigating division, and officially declared that the facts asserted by the Commission did not justify a dismissal (R. 32). Furthermore, it determined that it would be to the best interests of the Government to retain the plaintiff in its employ (R. 32). The Office for Emergency Management, therefore, formally appealed the order to the Board of Appeals and Review of the Commission (R. 32).

The Board of Appeals and Review which held a hearing on January 26, 1943, is a purely advisory body, subordinate to the Commission. Under the procedure on a hearing before that Board, as applied in this case, no evidence is submitted against the employee. The case against him is based entirely upon an investigator's report which is kept in the secret files of the Commission, is never shown or read to the employee, and like all such reports consists entirely of investigator's summaries of alleged statements by anonymous and unsworn "confidential" informants (R. 37).[3] Although the Court below stated that petitioner "was accorded the fullest opportunity to present his case and availed himself fully of the opportunity" (R. 76), petitioner was in fact given no opportunity to con-

[3] The record of the "hearing" in this case contains the following statement by the Chairman of the Board of Appeals and Review:

> "Incidentally we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation" (R. 37).

Petitioner regrets his inability to include in the record on this petition a transcript of the hearing before the Board of Appeals and Review. While he and his representative were allowed to see the transcript in the offices of the Commission and to transcribe some excerpts therefrom, the Commission by letter of January 11, 1945 specifically denied permission to make a copy of the transcript (R. 39, 42-43). The remainder of the record on which the Commission acted is, as noted above, in its secret files and was never made available to petitioner or his counsel.

front or cross-examine the informants against him or against the American Peace Mobilization.[4]

Petitioner did, however, present substantial and reliable evidence by public officials who, knowing his political views, testified that he was a loyal, devoted and efficient public servant[5] (R. 37-39). So convincing was this evidence that the Board of Appeals and Review concluded that petitioner should not be dismissed and so recommended to the Civil Service Commission[6] (R. 32).

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[4] Conceded by the Government in its brief below, p. 23.

[5] Testimony to this effect was given by (R. 37-38):

Charles N. Mills, Director of Personnel, Office for Emergency Management, officially representing his agency;

Richard W. Cooper, Chief of Personnel, War Manpower Commission, previously with the Office for Emergency Management, officially representing his agency;

Lester L. Evans, Acting Director of Personnel, Federal Works Agency;

Major Fred Zappolo, formerly Director of Personnel, Work Projects Administration, and at the time of hearing, engaged in personnel work in the Quartermaster Corps;

Jay W. Murphy, formerly on the personnel staff of the Works Projects Administration, and at the time of the hearing, engaged in confidential work in the Navy Department;

George Hamson, Assistant Director of Personnel, Office for Emergency Management; and

John Ashman, Chief of Classification Division, Office for Emergency Management.

In addition, letters were presented from Captain Arthur Schraeger, formerly on the personnel staff of the Works Projects Administration, and at the time of his letter engaged in personnel work in the Quartermaster Corps, and Elbert W. Smith, Assistant Director of Personnel, Farm Credit Administration (R. 38).

[6] This was revealed for the first time to petitioner by an admission of counsel for the Commission in response to a question by the District Court at oral argument on the Government's motion to dismiss the complaint. But for the Court's question, the secret character of the record before the Commission would have resulted in the withholding of this vital information from the petitioner and the Court.

The character of the record conceals from petitioner and the Court information of a similar nature, such as whether the Commissioners were unanimous in their determination to dismiss him.

The Commission, however, reasserted its conclusion that petitioner should be dismissed. By this time, petitioner was employed by the War Manpower Commission, to which he had been transferred as the result of a departmental reorganization. The War Manpower Commission referred the matter to a committee of its responsible officials, including its General Counsel (R. 32-33). On the basis of the findings of this committee it concluded, as had the Office for Emergency Management and the Civil Service Commission's Board of Appeals and Review, that the facts found concerning petitioner did not justify his dismissal (R. 33). Since the War Manpower Commission, too, found petitioner's services essential, it requested the Civil Service Commission to reconsider its action (R. 33). Duly authorized officials of the War Manpower Commission held many conferences with the Civil Service Commissioners on the case (R. 33). Finally, on April 19, 1944, the Personnel Director of the War Manpower Commission appeared in person on behalf of his agency, together with petitioner, before the three members of the Civil Service Commission in a further appeal of the case (R. 33).

In spite of the independent investigation, findings and firm requests of the Office for Emergency Management and the War Manpower Commission, the Civil Service Commission persisted in its conclusion and directed that petitioner be dismissed. The War Manpower Commission, believing that legally it had no choice but to comply with the direction, finally acceded thereto and separated petitioner from its service (R. 33).

Court Proceedings

Having exhausted his administrative remedies (R. 66), petitioner brought this action for a declaratory judgment that he was unlawfully dismissed from Government employment, for an order directing his reinstatement, for an injunction against interference with such reinstatement or other Government employment, and for supplementary re-

lief. The petitioner urged that the action of the Civil Service Commission was unlawful, in that it violated the First and Fifth Amendments to the Constitution; the provisions of Section 9(a) of the Hatch Act guaranteeing Federal employees the right to freedom of opinion; the Civil Service Act and Civil Service Rule I, Section 2, protecting Government employees against discrimination because of their political opinions; and the statutes recognizing the right of Government agencies such as the War Manpower Commission to make their own determinations concerning the retention of their employees free from direction by the Civil Service Commission or any other agency. The Government answered, justifying the action on the ground that petitioner's appointment to the Office for Emergency Management and to the War Manpower Commission were made "subject to investigation" (R. 25), that such an appointment reserved to the Civil Service Commission the authority to direct his dismissal, and that the dismissal was justified because the Commission's letter indicated a finding that there was "reasonable doubt as to the loyalty" of the petitioner, a ground for dismissal under War Service Regulation II, Section 3 (R. 25).

On motions for summary judgment, the District Court granted judgment for the Government, dismissing the complaint. The District Court found that the Commission was within its rights in holding that there was a reasonable doubt as to the petitioner's loyalty. It stated:

> "It can hardly be said that there could be no reasonable doubt of the loyalty of the member of a communist organization who opposed war against Germany so long as this country was an ally of Great Britain, a democracy, but became on advocate of war when this country became allied with Russia, a communistic and totalitarian state" (R. 70).

In dealing with the rights of Government employees to freedom of opinion, the Court stated:

> "The plaintiff has not been denied the right to express his opinions, but if his opinions as expressed and

> his conduct in conformance with those opinions have raised a reasonable doubt in the minds of the Commission of his loyalty, there is nothing in the Hatch Act that would prevent his removal from office" (R. 70).

The District Court also ruled that because the plaintiff was not regarded as falling within the "classified competitive civil service" he could not object to the direction from the Civil Service Commission to his employing agency, the War Manpower Commission (R. 70).

On appeal to the Court of Appeals for the District of Columbia, it affirmed the judgment of the District Court, but on a different ground. It did not consider the applicability of the statutory provisions urged as rendering unlawful the Commission's finding. It stated, indeed:

> "It is beyond our province, and it was beyond the province of the District Court, to review the finding of the Civil Service Commission that it had a reasonable doubt as to whether Friedman was loyal to the Government, because it has long been held that the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment in such matters for that of the officials" (R. 76).

For this conclusion it cited *Decatur* v. *Paulding*, 39 U. S. (14 Pet.) 496, 515, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131-132 (R. 76).

The present petition seeks review of this decision.

Questions Presented

1. Did the Court of Appeals err in refusing to determine whether the petitioner's constitutional and statutory rights of freedom of speech and opinion were violated by his dismissal from the Government service?

2. Did the dismissal of petitioner from the Government service violate specific statutory guarantees of freedom of speech and opinion granted to Federal employees?

3. Did the dismissal of petitioner from Government service violate the petitioner's constitutional rights of freedom of speech and opinion?

4. Did the standard of loyalty applied by the Civil Service Commission to cause the petitioner's dismissal violate the petitioner's rights of freedom of speech and opinion as granted by the Constitution and by statute?

5. Did the Civil Service Commission have authority to compel the War Manpower Commission, petitioner's employer, to dismiss petitioner, when the War Manpower Commission believed and had determined that the petitioner should be retained in its employ and that he was not disqualified from such employment?

Constitutional Provisions, Statutes, Rule and Regulation Involved

Petitioner asserts that his dismissal was in violation of the First and Fifth Amendments of the Constitution of the United States and of certain statutory provisions protecting Federal employees.

Section 2 of the Civil Service Act, Act of January 16, 1883, 22 Stat. 403, 5 U. S. C., Section 633, provides:

> "It shall be the duty of said commissioners (i.e., Civil Service Commissioners):
>
> "First: To aid the President, as he may request, in preparing suitable rules for carrying this Act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof into effect.
>
> Second: Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:
>
> * * * * * *
>
> Fifth: No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and

that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth: No person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

Pursuant to the said statutory provisions,[7] the President, by Executive Order, has promulgated as part of the Civil Service Rule I, Section 2, the following (Executive Order No. 8587, Nov. 7, 1940, CFR, Cum. Supp. 1943, Book 2, p. 1439):

"No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law."

Section 9(a) of the Hatch Act, Act of August 2, 1939, 53 Stat. 1148, 18 U. S. C., Sec. 61h, as amended by Act of July 19, 1940, Section 2, 54 Stat. 767, provides:

"All such persons (i.e., officers or employees in the executive branch of the Federal Government, or any agency or department thereof) shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

Civil Service Commission War Service Regulation II, Section 3 (promulgated by the Commission's departmental circular No. 323, February 28, 1942), provides as follows:

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[7] See "Civil Service Act, Rules and Regulations Annotated" (U. S. Civil Service Commission, 1943), p. 216.

"An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons:

* * * * * *

"(g) a reasonable doubt as to his loyalty to the Government of the United States;

* * * * * *

"Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service."

Reasons for Granting the Writ

This case presents important questions concerning the tenure and removal of Civil Service employees which have not been, but should be, settled by this Court. It raises fundamental questions of the power of the Federal District Courts with respect to violations of law relating to Federal personnel. The issues raised are related to those which were before the Court in *United States* v. *Elchibegof*, No. 442, this term; they involve "civil servants' rights of tenure" which the Government characterized as "matters of substance" in its petition for a writ of certiorari in that case. Further, the opinion of the court below conflicts with the decision of this Court in *Wickersham* v. *United States*, 201 U. S. 390, and with Section 10 of the Administrative Procedure Act, 60 Stat. 237.

The present case also involves important questions of freedom of speech and opinion under the Constitution and the statutes guaranteeing these rights to Federal employees. The question of the scope of standards of loyalty which may be applied to Government employees here presented is of great current interest and is even now receiving consideration by a Presidential commission.[8]

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[8] Exec. Order 9806, Nov. 25, 1946, 11 F. R. 13,863. There have been other government bodies considering this matter. Report of House Civil Service Sub-Committee pursuant to HR 66, 79th Cong., 1st Sess., Cong. Rec., July 20, 1946, pp. 9728-9730.

One aspect of the problem was recently before this Court in *United States* v. *Lovett*, U. S. , 66 S. Ct. 1073 (1946), which involved an attempted legislative ouster of three employees from the Government service because of their political views and affiliations. The present case concerns the same basic problem, except that the ouster was at the direction of an executive agency, the Civil Service Commission.

The case also presents questions concerning the power of the Civil Service Commission to impose standards of loyalty on other Government agencies which disagree with those standards, and to compel action by Government departments against their wishes and to the prejudice of the individual Federal employee.

I

In addition to the constitutional protections of freedom of speech and political opinion applicable to the citizenry generally, Federal employees have certain specific statutory protections as to the freedom of their political beliefs. These protections are contained in the Civil Service Act, an executive order pursuant to said Act which establishes a Civil Service Rule, and the Hatch Act.

The Civil Service Act, *supra* (p. 12), specifically provides that "No person in said (public) service has any right to use his official authority or influence to coerce the political action of any person or body". And Civil Service Rule I, Section 2, also quoted above, implements this protection by prohibiting inquiry into and barring discrimination because of "political or religious opinions or affiliations, except as may be authorized or required by law".

The Hatch Act expressly provides that all officers or employees in the executive branch "shall retain the right * * * to express their opinions on all political subjects and candidates" (*ibid.*).

Federal employees are thus given basic and important protections assuring their freedom of political opinion.

In this case it is undisputed that petitioner was dismissed at the Civil Service Commission's insistence solely because (1) he changed his mind between June and August of 1941 on the political issue of participation by this country in the war in Europe, and (2) he was affiliated with a lawful organization which expressed a point of view on this issue.

These grounds of dismissal are specifically proscribed by the statutes cited above guaranteeing to Federal employees their freedom of political opinion.

Since the petitioner was concededly dismissed because of his political views, and because of his membership in an organization—a method of expressing such views [9]—the case presents a question of substance and importance relating to the construction of statutes of the United States which has not been but which should be settled by this Court.

II

The Civil Service Commission has attempted to avoid the obvious violation of the statutory protections referred to above by claiming that the petitioner's views have raised a reasonable doubt as to his loyalty. The test of loyalty developed by the Commission and applied to Federal employees is that anyone who changed his mind in the summer of 1941 from opposing the participation of the United States in the war in Europe, to advocacy of such a step,

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[9] When President Roosevelt signed the Appropriation Act (57 Stat. 450) placing limitations upon the employment of Messrs. Lovett, Dodd and Watson, he expressed strong disapproval of such limitations, as follows:

> "There is no suggestion that the three named individuals have not loyally and competently performed the duties for which they have been employed. *They are sought to be disqualified for Federal employment because of political opinions attributed to them.*" H. Doc. 264, 78th Cong., 1st Sess. (1943), p. 1. Italics supplied.

Dr. Lovett had admitted membership, association or affiliation with the American Peace Mobilization, the very organization here in question (H. Rep. 448, 78th Cong., 1st Sess., 1943, p. 8). President Roosevelt obviously considered this as a form of expression of a political view.

would thereby be considered as being of doubtful loyalty. This test has been expressed in a public release of the Commission and in testimony of Commissioner Flemming before an appropriation subcommittee. See Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess. Independent Offices Appropriation Bill for 1945 (Dec. 9, 1943), pages 1083-1087.

We believe this test of loyalty is not only in direct violation of the statutory and constitutional protections referred to above, but improperly exceeds specific statutory standards of loyalty laid down by the Congress. The question of the loyalty of Government employees has been extensively considered by the Congress and the history of that consideration is recited in the opinion of this Court in *United States* v. *Lovett, supra,* 66 S. Ct. at 1075-1077. As a result of that consideration, the Congress adopted definite standards for the dismissal of Government employees it deemed disloyal. Those standards are set forth in specific statutory provisions. Section 9A of the Hatch Act (53 Stat. 1148, 1149, 18 U. S. C. Sec. 61(i)) prohibits the employment of persons belonging to organizations which advocate the overthrow of our constitutional form of Government. Appropriation statutes prohibit the payment of funds to employees who advocate the overthrow of the Government or who belong to organizations advocating such overthrow. See 66 S. Ct. 1075, note 2. These, together with the statutory oath of office (5 U. S. C., Sec. 16) to "support and defend the Constitution of the United States against all enemies, foreign and domestic", constitute a complete congressional code of qualification and disqualification for Federal employment on loyalty grounds. The exhaustive consideration given to the subject by the Congress clearly indicates that had it determined that further disqualifications were necessary it would have said so.

The Civil Service Commission, however, has exceeded the statutory grounds mentioned and added to them its own administrative test. The War Service Regulations were

promulgated by the Civil Service Commission itself under the authority of Executive Order No. 9063. In order to be valid, language in such War Service Regulation making "reasonable doubt as to loyalty" a ground for dismissal, must be construed as a shorthand restatement of the statutory prohibitions mentioned above. But the standards laid down by the Civil Service Commission are not a restatement of the Congressional standard. Thus, as to petitioner, it is admitted by the Government that he has not been charged with any violation of the Hatch Act (R. 23, par. 9). He has never been charged with advocacy of the overthrow of the Government. He has not been charged with failing to live up to his oath of office. And though there is no specific statutory prohibition thereof, it should be noted that petitioner has not been charged with being a member of the Communist Party. Petitioner has violated none of the statutory standards and yet is dismissed because of the Civil Service Commission's own administrative interpretation of the phrase "reasonable doubt as to loyalty".

The assertion of a right in the Commission to set up administrative tests of loyalty beyond those created by statute presents a question of substantial importance. Where the meaning of "loyalty" is not limited to a specified content defined by Congress, it permits individual judgment of a political character. Thus, petitioner is regarded as disloyal solely because of the Commission's disapproval of his political judgment concerning the significance of the belligerency of a friendly nation. It cannot be doubted that the Civil Service Commission's doubts as to the loyalty of employees is, in all sincerity, conditioned by the extent that the poltical opinions of the employees are distasteful to the individual members of the Commission. Other agencies do likewise and the standard of "reasonable doubt as to loyalty" means whatever an administrative agency sees fit to make it mean. The instant case is illuminating on this point. The Civil Service Commission vehemently asserts its doubts as to the petitioner's loyalty, while the

War Manpower Commission and its predecessor, the Office for Emergency Management, on exactly identical facts, and with more personal knowledge of the petitioner, together with the Civil Service Commission's Board of Appeals and Review, affirmed that the petitioner was unquestionably loyal and should be retained in the Government service. And, of course, the instant situation is not an isolated one.

It is clear from the record of this case that not only was the Civil Service Commission not dealing with doubt as to loyalty but that in fact its entire policy was based upon ousting political "undesirables" known not to be disloyal. Its acknowledged departure from congressional standards is emphasized by the procedures established for handling cases arising under its own administrative definition of disloyalty.

The "usual policy" of the Civil Service Commission (R. 51) is to permit persons charged with disloyalty to remain on their jobs pending administrative appeal. It must seem strange that the Commission on the one hand claims that it was dealing with dangerous and unreliable elements, and on the other hand establishes a procedure which in this case kept the petitioner in the employ of the Government for almost two years after the Commission made its decision that he was of doubtful loyalty. While the Commission first requested petitioner's dismissal on October 27, 1942 (R. 54), it permitted him to remain on his job pending investigation by his employing agencies and administrative appeal (R. 50-51, 54-56), so that the petitioner's actual dismissal did not occur until September 12, 1944 (R. 4).

The two war agencies employing petitioner, with personal, on-the-job familiarity with him, cognizant of the facts on which the Commission based its conclusion, and after inquiries which they independently undertook about him, resisted his ouster and repeatedly requested the Commission to reverse itself (R. 32-33). The Commission's Board of Appeals and Review, after hearing petitioner's appeal and observing him and the witnesses in his behalf,

testifying under oath, recommended his exoneration and retention (R. 32). And when, after a final appeal, the Commission remained unyielding in its conclusion, it nevertheless acquiesced in the request of petitioner's war agency that he remain on his job for a further period to complete "unfinished work" (R. 60-61).

These actions by the Commission are utterly inconsistent with its asserted doubts as to petitioner's loyalty. When viewed against the reasons given in the Commission's letter for its ordering petitioner's dismissal, it is clearer than ever that its determination was based solely on disapproval of petitioner's political views and affiliation as distinguished from doubts of his loyalty. If in fact the Civil Service Commission had any genuine doubt as to the petitioner's loyalty on a proper and lawful standard of loyalty, it would have been derelict in its duty if, during a period of war, it permitted the petitioner to remain on his job for a period of two years in a war agency. Certainly if it were proceeding against an individual who was considered as running afoul of the congressional definition of disloyalty, the above procedures would be inconceivable. That they were followed here is convincing evidence that the standard applied by the Commission was not one of loyalty, as specified by Congress, but rather of political conformity.

The Congress carefully adopted a standard of loyalty in specific terms, and eschewed vagueness, precisely because it realized the danger of permitting the subjective political judgment of different Government officers to become the standard for determining loyalty. We urge that the Congress adopted a definition of loyalty, that the Civil Service Commission exceeded its powers by dismissing petitioner for alleged disloyalty on an administrative definition different from that of the Congress, and that the Commission's administrative concept of loyalty violates specific statutory provisions protecting petitioner's freedom of opinion.

The question of the power of the Civil Service Commission so to expand its jurisdiction by constructing an

administrative test of loyalty and the extent to which that jurisdiction is limited by the congressional standards and other legislation with respect to loyalty are questions of undoubted importance which have not been and should be passed upon by this Court.

III

All of the statutory protections of the political freedom of Federal employees are elaborations of the basic protection of freedom of speech and political opinion safeguarded by the First and Fifth Amendments to the Constitution. Concededly Government employment is not a right which every citizen may demand irrespective of his qualifications, and reasonable requirements as to such employment are undoubtedly in the discretion of the officers charged with its management. But, as with any official privilege, these officers may not constitutionally set up subjective political tests to grant or withhold it, especially where the tests are designed to exclude persons holding lawful social, political o economic views. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146. There are constitutional limitations on the extent to which the Government may impose restrictions on its employees in the guise of establishing qualifications for their job. The Court below, however, has laid down without limitation, the broad statement that the United States "has the right to prescribe the qualifications of its employees and to attach conditions to their employment" (R. 76).

In *People* v. *Crane*, 214 N. Y. 154, 108 N. E. 427, *aff'd* 239 U. S. 195, Judge Cardozo said that a citizen could not be disqualified from public employment because of faith or color. And in his message approving the Hatch Act, President Roosevelt expressed his agreement with the view of the Attorney General that—

> "* * * qualifications (for Government service) cannot properly preclude government employees from the exercise of the right of free speech." 84 Cong. Record 10,746 (1939).

The present case presents a question of basic civil liberties and raises the issue whether Government employees can protect their civil rights as guaranted under the Constitution, by recourse to the Court. The witch-hunt which is now proceeding in the Government service and elsewhere, and which is not without precedent in earlier prewar and post-war periods (cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 1920, reversed as to some of the petitioners, 277 Fed. 129; Chafee, *"A Contemporary State Trial—U. S.* v. *Abrams,"* 33 Harv. Law Rev. [1920] 747) represents a serious threat to the freedom of opinion of Government employees. See William Shirer, *"Will 1920 Repeat; Another Red Scare Foreseen,"* N. Y. Herald Tribune, October 20, 1946.

Federal employees' rights of freedom of opinion are guaranteed by the Constitution. However, it is a simple matter to distort opinions of Federal employees which are unpopular into a charge of disloyalty. The instant case presents a clear example of the use of proper and lawful political opinion properly and lawfully expressed as proof of "doubt as to loyalty."

Petitioner was generally opposed to this country's participation in the war in Europe prior to the summer of 1941. He changed his mind at that time and one of the events influencing him was the involvement of Russia in the war. He felt this to be a significant factor affecting the safety and interests of the United States, which he fully explained to the Board of Appeals and Review of the Civil Service Commission. These political opinions of the petitioner nevertheless led to a decision by the Commission that his loyalty was doubtful. In essence the Commission's test of loyalty is that any person who, prior to the summer of 1941, believed it desirable to remain out of the war in Europe, and who changed his mind during the summer of 1941, may be a disloyal person (*supra*, pp. 15-16). The fear is (a) that such a person may have changed his views because of Russia's engagement in the war and (b) this then is interpreted into an allegation of his greater concern for the interests of Russia than those of the United States.

As applied to the petitioner, this last interpretive twist as to his excessive interest in a foreign power is manufactured out of whole cloth and is derived entirely from the political thoughts of the members of the Civil Service Commission. This is neither an analysis nor a finding of fact. It is simply a subjective political judgment of the individual Commissioners.

The standard devised by the Commission exposes to the imputation of disloyalty the views of innumerable citizens whenever they express any opinions on foreign affairs, especially on an issue that is once as profound and delicate as American participation in a war. With this approach many could be condemned as following a "British party line", a "French party line",[10] a Spanish party line", etc.

Men such as Judge Jerome N. Frank of the Second Circuit and George Wharton Pepper, who changed their minds as to the desirability of the American participation in the recent war in relation to the fortunes of France and England, may, under the test devised by the Civil Service Commission, have their loyalty doubted.[11] The very test here involved would cast aspersions on the loyalty of Chester Bowles, former Price Administrator and Director of Economic Stabilization. He joined the American First Committee in 1940 and subsequently changed his mind, the change being occasioned by the attack on Russia on June 22, 1941. He stated (PM Sunday Magazine, October 20, 1946, p. 16):

> "Until 1941 I thought of it (Hitlerism) as a passing phase, a local middle-European phenomenon, a bad

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[10] In fact, in the Jeffersonian era the Federalists were commonly referred to as the "English party" and the Jeffersonians as the "French party". And the odious Alien and Sedition Acts passed during the Madison administration represented an effort by the "English party" to curb the "French party" in the expression of its views. 2 Beveridge, *Life of John Marshall* (1916), 311-312, 319, 332, 383, n. 2.

[11] See Frank, *If Men Were Angels* (1942), page 332, note; Pepper, *Philadelphia Lawyer* (1944), 272-273.

answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old-world powers."

The grant to any official of a Government agency of the right to determine loyalty or disloyalty upon the basis of political opinion of citizens means an end to freedom of opinion of those who are subject to the power of such an agency. For doubts as to the loyalty of many groups are freely expressed wherever those groups are unpopular. Thus large segments of opinion regard Catholics as disloyal to this country and loyal only to Rome. Jews have been stigmatized as loyal to the interests of their coreligionists in disregard of the interest of the United States. Various national groups have been attacked as primarily loyal to the lands of their forebears. Opinion to the left of any speaker is frequently regarded as Communist and therefor disloyal, while opinion to the right of him is Fascist and disloyal for that reason.

The test laid down in this case by the Civil Service Commission is not the only one which can be applied if the decision of the Court below is to stand. For the Civil Service Commission can then proceed to erect new tests as to political opinion which it believes create "reasonable doubt" as to loyalty. Thus, preoccupation with our difficulties with Russia may cause the Commission to entertain a "reasonable doubt" as to the loyalty of any person who, for example, advocates turning our atomic bomb secret over to the United Nations, for then such secrets would be available to Russia. This would place that large segment of opinion which supported Henry Wallace's reported proposal for turning the atomic bomb secret over to Russia (N. Y. Times, September 22, 1945) in the category of proscribed disloyal persons ineligible for Federal employment. In fact, any political view on matters relating to foreign policy and perhaps domestic policy, which might be regarded, however honestly,

by three individuals who constitute the Civil Service Commission, as an indication of disloyalty, might bar from Federal employment large sections of the population. Thus a majority of the Civil Service Commissioners, who by statute may be and usually are adherents of particular parties,[12] would under such a test be given unlimited power to attribute disloyalty to the party out of office. Powerful political parties as well as unpopular minorities may be designated as disloyal by their opponents. We have just come through a campaign in which precisely this type of charge was commonly levelled by one political party against its opposition.

To permit the use of political opinion as a test of loyalty invites the official imposition of political orthodoxy on Federal employees in violation of the opinions of this Court. See *West Virginia* v. *Barnette,* 319 U. S. 624 at 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox, in politics, nationalism, religion or other matters of opinion."

The extent of constitutional protection to the free expression of political opinion by Federal employees is directly raised by this case. The Court below, in disregarding this constitutional protection, erroneously decided a constitutional question of substance which has not been but which should be settled by this Court.

IV

The Court below refused to examine petitioner's charges that his dismissal violated the statutory and constitutional protections cited above. It stated that the question of dis-

[12] Section 1 of the Civil Service Act provides that no more than two shall be adherents of the same political party. 22 Stat. 403, 5 U. S. C. Sec. 632.

missal of Federal employees involves internal management affairs in which the Court would not interfere. The Court stated specifically that it was beyond its province to review the action of the Civil Service Commission (R. 76). Thus violations of statutory and constitutional rights were held not to be proper subjects of inquiry by the Court because they involved matters of internal management of Government agencies. Such a ruling is obviously of substantial importance, since it affects the protection guaranteed by statute and the Constitution to Government employees and since "civil servants' rights of tenure are undoubtedly matters of substance." See petition of the Government at page 14, in *United States* v. *Elchibegof, supra.*

The opinion of the Court of Appeals is in conflict with an applicable decision of this Court. In refusing to redress violations of statutory and constitutional rights, the Court below departed from the rule laid down by this Court in *United States* v. *Wickersham*, 201 U. S. 390. It also violated the general rules applicable to judicial review of administrative action which have been reaffirmed recently in Section 10 of the Administrative Procedure Act.

In *United States* v. *Wickersham* this Court held that the dismissal of a Federal employee in violation of a rule prescribed by presidential order "was without legal effect", 201 U. S. at 398. The Court inquired in some detail as to such internal managerial matters as the prescribed dismissal procedure the question of whether the action against the employee was a "suspension" or a "dismissal" (at 396-397), and which of the employee's superiors was empowered to effectuate his discharge. The case is a clear holding that the dismissal of a Government worker in violation of a presidential order—and a fortiori, one may assume, in violation of the Constitution and statute—presents a case for judicial review and correction.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., Sec. 1009, provides that except where judicial review is specifically precluded by statute or where agency action is by law committed to agency discretion, "any per-

son suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof". The scope of that review is set forth in Section 10(e) of the Act, which states that the reviewing Court shall hold unlawful and set aside action found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right * * *." This Act is a reaffirmation of pre-existing principles [12a] and was in effect at the time the decision of the Court of Appeals was made. Section 10 is subject to no exception for Government personnel functions.[13]

The issue presented by this case is the extent of the examination which Courts may or must make of the rights of Federal employees dismissed in alleged violation of statutory and constitutional guarantees. This case is thus a companion piece of the *Elchibegof* case. Since that case has been withdrawn by the Government, the instant case alone presents for consideration the questions which led to the granting of the writ in the *Elchibegof* case.

The opinion of the Court below is not in any way limited to the fact that the petitioner, an employee of nine years' standing, is claimed not to have had permanent Civil Service status. The statutory rights, violation of which was charged in his dismissal, apply by their terms to all employees of the Federal Government whether or not they have permanent Civil Service status. Indeed, for example,

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[12a] See "Appendix to Attorney General's Statement * * *" on 5.7, in Sen. Rep. 752, 79th Cong., 1st Sess. (1945), p. 44.

[13] Exceptions for matters involving personnel and agency management or to public property, loans, grants, benefits or contracts, are exceptions from the procedural requirements with relation to rule making only. Section 4 of the Act. Section 5 dealing with adjudication also does not apply to the selection or tenure of an officer or employee of the United States. *None of these exceptions, however, apply to Section 10, the judicial review section.*

the Hatch Act provisions in question, contained in Section 9(a), were adopted to apply specifically to those Federal employees who, like petitioner, did not have a permanent Civil Service status. Hatch Act, Sec. 15, 54 Stat. 767, 18 U. S. C., Sec. 61O. And Rule I, Sec. 2, *supra*, p. 12, by its terms, bars political discrimination even as against applicants.

The Court below in refusing to review the violations of law and the Constitution by the Civil Service Commission in this case, cited in support of its action the cases of *Decatur* v. *Paulding*, 39 U. S. (14 Pet.) 496, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. In so doing, however, the Court overlooked the fact that *United States* v. *Wickersham, supra*, specifically held that the matter of a dismissal of a Federal employee in violation of specific safeguards for his benefit was the type of "internal" matter for which judicial protection is available. The decision below that there may not be review by the Court of violation of statutory and constitutional protections, granted Government employees, if permitted to stand, will permit the elimination in practice of all the provisions enacted for the protection of such employees.

For example, the ban on the spoils system stems from the Civil Service Act and Rule I, Section 2, *supra*. If an employee entitled to the protection of these provisions happens to be a Republican and is dismissed for that reason by a Democratic administration, the Court below has held itself powerless to correct that illegality, because it involves internal personnel management. In practice an effort would presumably be made to mask a discharge on such political grounds by the assertion that the employee is inefficient and that his dismissal will "promote the efficiency of (the) service", adequate ground for dismissal of a classified civil service employee under Section 6 of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U. S. C., Sec. 652. But under the decision below, even if the dismissing agency admits that the employee's inefficiency consists solely of his superior's belief that the Republican employee is incompetent to serve in a Democratic Administration, the

Court is powerless to act, because the matter involves "internal" administration.

The Civil Service rule also bans discrimination in Federal employment on religious grounds. Suppose again that an employee's dismissal is sought to be justified as promoting the efficiency of the service, but it can be established that the employee is a devotee of a faith to which a number of his co-workers are hostile, and his superior admits that the discharge was based solely on a belief that such action would reduce office friction. Here, too, the decision of the Court below makes impossible the enforcement of the rule.

The point at issue here does not concern a case where there is a dispute as to whether the discharge was in fact for reasons proscribed by statute. We are concerned only with cases where it is admitted, as it is here, that the employee was dismissed because of his political views.

Any conclusion other than that providing for judicial review would render illusory the safeguards conferred by the statutes governing Federal employment. If infractions are to be shrugged off by the Courts as internal executive matters, these rights would lose their meaning. The doctrine of the *Wickersham* case preserves these rights by subjecting executive violations to judicial review. The Court below erred in disregarding it.

It is submitted that the vast powers to nullify statutory and constitutional protections, which the decision below grants to the executive, should not be so yielded, particularly where matters of fundamental freedom of speech and opinion are involved, without examination by this Court of the limit of these powers.

V

The witch-hunt which resulted in petitioner's dismissal is not over and will not be over even if within the next year or two the procedure of War Service appointments and appointments "subject to investigation" should be aban-

doned. For loyalty tests will apparently be with us for some time to come. Besides the general congressional preoccupation with the matter, there is a permanent Committee on Un-American Activities of the House primarily concerned with the opinions of Federal employees. Moreover, the executive has appointed a committee which will soon have a report recommending "what standards are desirable for judging the loyalty of employees of the Government and applicants for such employment" (Par. 3(d) of Executive Order 9806, *supra,* n. 8).

To turn control of political thoughts over to the Civil Service Commission or to some other presidential commission on loyalty, will result in a civil service not bold to examine the truth but rather timid and fearful, lest its opinions be regarded as unorthodox and its security jeopardized. The devitalizing effects of the witch-hunts which have gone by can be felt throughout the Government service.[14] Government employees are now fearful to mention, even in casual conversation, or in drawing rooms, ideas which may be regarded as unorthodox.[15] Views on foreign policy and economic matters are expressed only in the most carefully guarded terms. The efficiency of the Government service cannot but be impaired in this atmosphere of a campaign of terror.

Whatever legitimate inquiries there may be for security purposes concerning loyalty, the scope of the concept of

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[14] President Mitchell of the Civil Service Commission has stated that 1,299 people were held ineligible for government service on the grounds of disloyalty from the beginning of the period of war emergency until August 31, 1946. In the same address President Mitchell stated: "Admittedly much of the evidence which the Commission had before it was obtained in confidence and could not have been secured if it had to be produced in open court. For that reason many of these persons could not have been convicted as disloyal in an open trial". Address before the National League of Postmasters, San Francisco, October 24, 1946.

[15] *Snooping on the Potomac,* by Henry F. Pringle, Saturday Evening Post, January 15, 1944; *Red Baiting in Washington,* by Gerhard Gesele and Charles A. Horsky, New Republic, June 8, 1942.

loyalty in relation to freedom of speech and opinion is an important question which has never been passed on by this Court and which should be decided.

VI

The present case presents an important question concerning the allocation of powers between the Civil Service Commission and the other departments and agencies of the Government. The Civil Service Commission in this situation has maintained and exercised a power to dictate to the War Manpower Commission and to other agencies of the Government the dismissal of employees which the employing agency desires to retain. As shown above, petitioner was an exceptionally capable employee of the Government. The Office for Emergency Management and the Chairman of the War Manpower Commission, after investigation, spent every effort to retain him on their payrolls, thus indicating their unqualified belief that the good of the service required his retention. Nevertheless, the Civil Service Commission directed dismissal of this employee.

Perhaps no principle of governmental administration is more firmly established than the doctrine that the power to appoint carries with it the power to dismiss and that dismissal is a power granted only to the heads of the employing agencies. See the discussion in *Myers* v. *United States*, 272 U. S. 52, 109-172.[16] The present case presents a challenge by the Civil Service Commission to this general rule. The Commission in this case is asserting the right to act as an overall quasi-judicial agency to deter-

[16] The Executive Order creating the War Manpower Commission provides: "Within the limits of such funds as may be made available for that purpose, the Chairman (of the War Manpower Commission) may *appoint such personnel* and make provision for such supplies, facilities and services as may be necessary to carry out the provisions of this Order." Exec. Order 9139, April 18, 1942, C. F. R., Cum. Supp. (1943), Book 1, pp. 1145, 1146-1147 (emphasis supplied).

mine loyalty of Federal employees and to enforce its decision over the opposition of the heads of administrative departments of the Government who do not share its doubts as to loyalty of their employees.

The effect of this asserted power of the Civil Service Commission is far-reaching. The heads of Government agencies are entrusted with the responsibility for executing the functions of their departments. These responsibilities can be carried out only if control of personnel, with respect to retention on the payroll, rests in their hands. Execution of a program can be hampered by requiring the dismissal of the employees who are carrying it out, even more so than by a refusal to appoint an employee desired by an agency.[17] In the instant case the Chairman of the

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[17] Indeed the analysis of the *Myers* case, in distinguishing between the power of appointment and the power of removal, clearly indicates the reasons why the present regulations should be construed to permit the petitioner's loyalty to be judged by his employing agency and not by an outside group not having on-the-job familiarity with him. Thus, at pages 121, 122, this Court stated:

> "* * * the power of removal, though equally essential to the executive power, is different in its nature from that of appointment. * * * The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. * * *
>
> "* * * When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."

War Manpower Commission urged before the Civil Service Commission, and obviously felt, that the dismissal of the petitioner would impair the functioning of his office.

The doctrine of responsibility of the heads of an agency for the functioning of his department, including his exclusive power to dismiss his own employees, was recognized in the *Myers* case, *supra,* and embodied in the Lloyd-LaFollette Act governing the rights of Federal employees on dismissal (37 Stat. 555, 5 U. S. C., Sec. 652). See also 30 Op. Atty. Gen. 79, 83; 21 Op. Atty. Gen. 355. The basic division of function represented by this doctrine is one which should not be regarded lightly as having been intended to be disturbed.

The device of an appointment subject to condition, here sought to be utilized, cannot be used to avoid this basic rule of the distribution of power between the Civil Service Commission and the other agencies of the Government. *Wolff* v. *Hodson,* 285 N. Y. 196, 33 N. E. 2d 90.

The question of the allocation of responsibility for dismissal of personnel among the agencies of the Government is a question of great importance, which in the context of the regulation here involved, has not been decided by this Court. It is important that this Court should make a determination on this issue.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN, *Petitioner,*

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission.

REPLY TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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REPLY TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

A. The Government's opposition at page 10 states "we do not understand him (petitioner) to challenge the legality of the Civil Service Rule pursuant to which he was removed . . ." This is a complete misunderstanding of the position taken in our petition as set forth in pages 16-18 thereof. Our position is briefly as follows:

1. The Civil Service Commission can adopt only procedural regulations. As stated at page 17 of our petition "In order to be valid language in such War Service Regulation making 'reasonable doubt as to loyalty' a ground for dismissal must be construed as a shorthand restatement

of the statutory prohibitions..." concerning employment of persons belonging to organizations advocating the overthrow of the Government. It is clearly our position that the standard "reasonable doubt as to loyalty" should be so construed and in that case petitioner was illegally dismissed.

2. However, if the standard is not to be construed as petitioner believes proper, but is to be broadly construed as the government contends, then the disqualification for "reasonable doubt as to loyalty" becomes a substantive rule beyond the power of the Commission to adopt. In that event the analysis set forth at pages 7-12 of the brief of the United Public Workers *amicus curiae* demonstrates the lack of power of the Commission, and the illegality of its rule.

B. The Government attempts to explain away the clear conflict between the *Wickersham* case, 201 U. S. 390, and the opinion of the Court below by pointing out that the *Wickersham* case involved a failure of the Government officials to follow procedural requirements prescribed by statute in dismissing the employee, whereas in the instant case the procedural requirements were followed. See note 5, page 13 of Government's Brief in Opposition. If the *Wickersham* case is to be limited to protect only procedural rights and to deny to Government employees the protection of substantive rights granted them by statute, it is submitted that the departure is of such significance that it should be made only by this Court.

C. The Government's discussion of the Communist party line (see pages 14-20, 26-31, of its opposition) is a mere smokescreen. It is clear on the record that the petitioner has not been charged with membership in the Communist party or with advocating the overthrow of the Government. R. 23, ¶ 9. The emphasis in the Government's brief on guilt by implication and determinations by Civil Service Commissioners that persons are "potentially disloyal" (see

note 8, page 17) emphasizes the need stressed in our petition to declare that the Civil Service Commission has no power to define loyalty and that its regulations must be restricted to the statutory definitions of loyalty adopted by the Congress.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN, PETITIONER

v.

LEWIS B. SCHWELLENBACH, INDIVIDUALLY AND AS SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 62–71) is reported at 65 F. Supp. 254. The opinion of the United States Court of Appeals for the District of Columbia (R. 73–76) is not as yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1946 (R. 77). The

petition for a writ of certiorari was filed February 6, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a person having no civil service status, who was transferred to a war agency subject to the Civil Service Commission's approval as to his qualifications for a War Service appointment and after the Commission had determined that he was not qualified for such appointment because of doubt as to his loyalty to the United States and his services had been terminated, is entitled to mandatory, injunctive, and declaratory relief, including an order directing his reinstatement.

EXECUTIVE ORDERS, AND RULES AND REGULATIONS INVOLVED

The pertinent portions of the executive orders, and rules and regulations involved are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

On May 29, 1942, petitioner, who had been employed by the Federal Works Agency of the United States in positions excepted from the classified civil service (Act of November 26, 1940, Section 1, 54 Stat. 1211, 5 U. S. C. 631 (a)), was transferred to a war agency, the Division of

Central Administrative Services, Office for Emergency Management, where, for the first time, he came within the jurisdiction of the Civil Service Commission (R. 47–48). This transfer was expressly made "subject to character investigation," after which, if the findings were favorable, he became entitled to a War Service appointment.[1] Without change in status, petitioner, while said investigation was being conducted and while certain of the events hereinafter described were taking place, was involved first in an interoffice transfer on September 16, 1942, to the War Manpower Commission Personnel Branch, Central Administrative Services, Office for Emergency Management, and later, on March 27, 1943, in a group transfer shifting all personnel functions of the Office for Emergency Management to its constituent agencies—in petitioner's case, the War Manpower Commission (R. 47).

The Civil Service Commission's War Service Regulation II, Section 3, effective March 16, 1942, and prepared and adopted by the Civil Service Commission pursuant to Executive Orders No. 9063 and 9067 (Appendix, pp. 22–25), provides as follows:

> SEC. 3. *Disqualifications.*—An applicant may be denied examination and an eligible may be denied appointment for any of

[1] A War Service appointment did not confer a classified, civil service status but permitted the retention of the person so appointed to a tenure limited to the duration of the war and six months thereafter (R. 45, 63).

the following reasons: (a) Dismissal from the service for delinquency or misconduct; (b) physical or mental unfitness for the position for which he applies: *Provided,* that the physical requirements may be waived in the case of any person entitled to disability preference; (c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment; (e) refusal to furnish testimony as required by Civil Service Rule XIV; (f) habitual use of intoxicating beverages to excess; (g) a reasonable doubt as to his loyalty to the Government of the United States; (h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall also be sufficient cause for removal from the service.

Subsequent to petitioner's conditional transfer to the Division of Administrative Services, Office for Emergency Management, the Commission conducted an investigation as to petitioner's qualifications. As a result of the investigation, the Commission determined that there was a reasonable doubt as to petitioner's loyalty to the Government of the United States and that petitioner was therefore not eligible for federal employment in a War Service status. On October 27, 1942, the Commission requested Central Administrative

Services, Office for Emergency Management, to terminate petitioner's services (R. 50, 54). Petitioner appealed from this decision and a hearing was held on January 26, 1943, before the Board of Appeals and Review of the Commission (R. 50).[2] At the hearing petitioner was given full opportunity to present for consideration all the evidence and testimony he desired on the question of his eligibility for a War Service appointment (R. 37–39). Thereafter, the Commission, upon review and reconsideration of the entire record, reaffirmed its determination that petitioner was ineligible for a War Service appointment and by letter of May 3, 1943, so notified petitioner (R. 55). The Office of Emergency Management was also notified on May 3, 1943, that the Commission's previous action had been affirmed (R. 56). On March 27, 1943, however, petitioner had been part of a group transfer to the War Manpower Commission (R. 47). In a letter of May 17, 1943, from the War Manpower Commission to the Civil Service Commission, it was stated that the letter of May 3, 1943, was the first official notification which had been received by the War Manpower Commission concerning

[2] While the record is silent in this respect, we are advised by the Civil Service Commission that the Board of Appeals and Review recommended to the Commission by a two-to-one vote that petitioner be declared eligible for a War Service appointment.

the case and because of that fact they wished "to refrain from taking action in this matter until the War Manpower Commission can make a preliminary investigation of the facts in the case, and give consideration to the possibility of a formal appeal by this agency * * * for hearing by the United States Civil Service Commission" (R. 57–58). On October 13, 1943, the War Manpower Commission requested the Civil Service Commission to reconsider petitioner's case (R. 50). Following reconsideration, the Civil Service Commission advised the War Manpower Commission by letter dated February 25, 1944, that it had reaffirmed its original action (R. 51, 58–59). On March 23, 1944, the War Manpower Commission notified the Civil Service Commission that "Mr. Friedman has requested a personal appearance before the Commissioners and action looking toward his separation is, therefore, not being taken pending this hearing" (R. 59–60). The Civil Service Commission, in accordance with its usual policy, did not object to petitioner's continued employment pending his appeal (R. 51).

Petitioner was heard by the Commission on April 19, 1944 (R. 60). The Commission, after giving "most careful consideration" to the case, advised petitioner by letter of June 5, 1944, that it affirmed its previous action (R. 7–9). This letter set forth some of the principal factors which

led the Commission to conclude that there was a reasonable doubt as to petitioner's loyalty, but the letter did not constitute, nor did it purport to constitute, a full statement of the specific reasons for the determination of the Civil Service Commission which was based upon the complete investigation which had been made, including confidential reports of the Federal Bureau of Investigation (R. 51).

The War Manpower Commission terminated petitioner's employment as of July 10, 1944, plus accumulated annual leave to September 12, 1944 (R. 2, 52, 60–61). On August 16, 1944, the Civil Service Commission advised petitioner that any applications or eligibilities for examinations he might have had been cancelled[3] because of information disclosed through investigation which indicated that petitioner did not measure up to the standard of suitability and fitness maintained for Government employment (R. 52, 61). The records of the Civil Service Commission did not disclose, however, that petitioner had any applications or eligibilities for examinations then pending (R. 52).

On December 24, 1944, petitioner filed a complaint in the United States District Court for the District of Columbia seeking "a declaratory judgment, mandamus, injunction and further

[3] See United States Civil Service Commission, *Civil Service Act, Rules and Regulations Annotated* (1943), p. 68.

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relief" (R. 1).[4] He sought a declaratory judgment that he was improperly dismissed from his position with the War Manpower Commission and is entitled to reinstatement for the reason that his dismissal was based upon improper grounds in violation of the First and Fifth Amendments to the Constitution of the United States, the Civil Service Act (Act of January 16, 1883, 22 Stat. 403; 5 U. S. C. 632 *et seq.*, the Hatch Act, Section 9 (a) (Act of August 2, 1939, 53 Stat. 1147, 1148, as amended by the Act of July 19, 1940, Sec. 2, 54 Stat. 767, 18 U. S. C. 61h), and Civil Service Rule I, and that the Civil Service Commission had no authority to require the dismissal of petitioner but that the War Manpower Commission was required to exercise its own discretion in determining whether there existed proper cause for

[4] Originally named as defendants were Paul V. McNutt, individually and as Chairman of the War Manpower Commission, and Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, individually and as members of the United States Civil Service Commission. Because of the resignation of Mr. McNutt as Chairman of the War Manpower Commission and the transfer on September 19, 1945, pursuant to Executive Order No. 9617 (10 F. R. 11929), of that wartime agency and all its functions, employees, and records, with certain exceptions not here material, to the Department of Labor, Lewis B. Schwellenbach, individually and as Secretary of Labor, was substituted as a party defendant (R. 43). After defendant Lucille Foster McMillin had ceased to hold office as a member of the Civil Service Commission and Frances Perkins had been appointed as a member and inducted into office, an order was entered substituting Frances Perkins, individually and as a member of the Civil Service Commission, as a party defendant (R. 76a).

the removal of the petitioner. Petitioner further sought an order directing the then defendant McNutt, as Chairman of the War Manpower Commission, to reinstate him. He also sought an injunction enjoining the members of the Civil Service Commission from interfering in any way with his reinstatement with the War Manpower Commission or his employment in any other position, for which he might otherwise be eligible, with any other agency of the United States Government, and an order directing the members of the Civil Service Commission to withdraw their cancellation of any pending applications and eligibilities for examination which he might have.

After respondents answered, both sides moved for summary judgment and filed supporting affidavits. The district court granted respondents' motion for summary judgment, holding that the Civil Service Commission had "acted pursuant to law and the courts are without jurisdiction to control its action so long as it complies with the law" (R. 70–71). On appeal, the court below affirmed the judgment of the district court. After holding that the War Service Regulation in question "was reasonable and proper and the making of it was well within the scope of the authority conferred on the Commission by the Act and the two executive orders", the Court stated (R. 76):

> It is beyond our province, and it was beyond the province of the District Court, to review the finding of the Civil Service

Commission that it had a reasonable doubt as to whether Friedman was loyal to the government, because it has long been held that the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment in such matters for that of the officials.

ARGUMENT

Although the petition herein, as well as the *amicus* brief of the United Public Workers of America (C. I. O.), devotes most of its discussion to an alleged infringement of petitioner's civil liberties, the action which petitioner has brought is relatively simple in character, and its disposition is, we submit, controlled by principles which make it unnecessary to pass upon the civil liberty contentions which petitioner seeks to urge. Petitioner neither has nor claims a civil service status. What he seeks is a declaratory judgment that he was illegally dismissed and an order directing his reappointment to a position wherein his tenure would be limited to the duration of the war and six months thereafter. We do not understand him to challenge the legality of the Civil Service Rule pursuant to which he was removed, nor to contend that any procedural requirement, established either by statutes or regulations, has not been followed. His contention is and must be that

the determination of the Civil Service Commission in respect of any finding made by it under War Service Regulation II, 3, is subject to judicial review, at least to the extent that it is arbitrary and capricious. We submit that under settled law a determination of this character by the Civil Service Commission is not subject to judicial review and that even if it were the determination was not arbitrary or capricious.

1. It is settled law that the courts will not review the acts of executive officials performed within the scope of the executive authority, nor will the court substitute its judgment for that of the officials. *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131–132. This principle of non-intervention in the internal administration of the executive branch of the Government has been uniformly applied in the field of personnel administration. *Keim* v. *United States,* 177 U. S. 290; *Eberlein* v. *United States,* 257 U. S. 82; *White* v. *Berry,* 171 U. S. 366; *Hammond* v. *Hull,* 131 F. 2d 23 (App. D. C.), certiorari denied, 318 U. S. 777; *Love* v. *United States,* 108 F. 2d 43 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Levine* v. *Farley,* 107 F. 2d 186 (App. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Lellmann* v. *United States,* 37 C. Cls. 128; *Miller* v. *United States,* 45 C. Cls. 509; *Kellom* v. *United*

States, 55 C. Cls. 174; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Bennett* v. *United States,* 89 C. Cls. 322; *Bratton* v. *United States,* 90 C. Cls. 604; *Block* v. *Sassaman,* 26 F. Supp. 105 (D. Minn.); *Waterman* v. *Somervell,* 34 F. Supp. 695 (S. D. N. Y.), certiorari to C. C. A. 2 denied, 317 U. S. 630.

In *Keim* v. *United States,* 177 U. S. 290, the plaintiff was discharged as inefficient. He brought suit in the Court of Claims requesting that court to find that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship" (177 U. S. at 292). These findings the Court of Claims declined to make, "deeming said requested findings, if true, to be irrelevant to the issue presented" (177 U. S. at 292). In affirming the dismissal of plaintiff's action, this Court stated (177 U. S. at 292, 293):

> Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.
>
> It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. * * *

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. * * *

Under the principle established by the above cases, the action of the Civil Service Commission here involved is not subject to review by the courts.[5] This principle has particular applicability to this case. Here petitioner was in no sense a permanent employee, nor did he have any tenure or civil service status whatsoever. He has been given a conditional transfer, which for present purposes is completely analogous to a conditional appointment, and such conditional transfer was expressly made subject to investigation. He is in no better position therefore than any outsider who applies for a position with the United States Government, and, in such circumstances, it would seem clear that no one would question the right of

[5] The instant case is sharply distinguishable from *United States* v. *Wickersham*, 201 U. S. 390, and *United States* v. *Elchibegoff*, No. 442, this Term, writ dismissed Feb. 3, 1947. Recovery was allowed in both those cases because of the failure of the government officials to follow procedural requirements prescribed by statute in dismissing the employee. Here, the procedural requirements were followed.

the executive branch of the Government to refuse to employ him if in its opinion he did not have the requisite qualifications. It is submitted that the court below was clearly correct in holding that it was not within its province to interfere with the Civil Service Commission in its refusal to approve petitioner for a War Service appointment.

2. Moreover, even assuming that a limited right of judicial review existed, the Commission's determination was not arbitrary or capricious. The petitioner admits (R. 9, 35) that he was not merely a member but was "prominently and actively affiliated" with the American Peace Mobilization, a recognized Communist "front" organization,* "participated actively in their

* The Attorney General has found that American Peace Mobilization (of which the Washington Peace Mobilization was a subsidiary) was a Communist-inspired and Communist "front" organization (Memorandum of the Attorney General reprinted in full in Hearings before the Special Committee on Un-American Activities, House of Representatives, 78th Cong., 2d Sess., *Investigation of Un-American Propaganda Activities in the United States* (Vol. 17), pp. 10282–10284):

"American Peace Mobilization was formed in the summer of 1940, under the auspices of the Communist Party and the Young Communist League as a "front" organization designed to mold American opinion against participation in the war against Germany. Its existence terminated within a month after the German invasion of Russia, when it became American People's Mobilization and adopted a program favoring complete assistance to Britain, Russia, and China. * * *

* * * * *

meetings and affairs," and was "active in the affairs of the Washington Peace Mobilization and served on several of its committees." Moreover, petitioner admitted that he was opposed to the participation of the United States in the war before the invasion of Russia by Germany, but thereafter soon changed his mind and adopted the view that the United States should enter the war (R. 7–9). This shift in position was one of the tests recognized not only by the Commis-

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" * * * American Peace Mobilization sponsored the march on Washington, January 25-27, 1941, when the delegates attempted to picket the Capitol and to see congressional and administration leaders. Later, on April 4 and 5, 1941, it sponsored the so-called American People's Meeting in New York City. These meetings were dominated by leaders of Communist-front organizations and the programs and pamphlets issued in connection with these meetings contained advertisements and greetings of Communist-penetrated organizations. * * * Each of the foregoing positions [taken by American Peace Mobilization] conformed exactly to the Communist Party line. American Peace Mobilization numbered among its officers and sponsors several leading Communists and the heads of several Communist-penetrated groups.

* * * * *

"Ever since 1918, and before, there have been in existence in the United States organizations devoted to peace and to the goal of keeping America out of war. Not one of these organizations, however, was formally represented as an organization in any way in American Peace Mobilization. These organizations devoted to antiwar activities have been continuously ignored in the columns of the Daily Worker and other Communist publications, whereas these same periodicals gave full support to American Peace Mobilization."

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sion for determining extreme Communistic sympathies (see Appendix, pp. 26–31) but also was a frequently employed test for determining Communist "party line" affiliations.[7]

Confronted with this evidence the Commission had to make a decision under the applicable regulation. It may be argued that this evidence is insufficient to compel the conclusion that petitioner was disloyal to the United States, but it certainly cannot be seriously contended that it is not sufficient to present noncapricious reasons for doubt as to such loyalty. In these circumstances the Commission found, as it rationally could, that there was reasonable doubt as to petitioner's loyalty.[8]

3. Petitioner contends that the Civil Service

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[7] The Communist Party line test has been frequently cited. See, e.g., Report of the Special Committee on Un-American Activities, H. Rep. 1311, 78th Cong., 2d Sess., *Investigation of Un-American Propaganda Activities in the United States*, p. 186.

[8] Civil Service Commissioner Arthur S. Flemming, testifying before the Subcommittee of the Committee on Appropriations of the House of Representatives (78th Cong., 2d Sess.), discussed the Commission's position concerning its requirement that a person's loyalty to the United States be established before he is appointed to a war job. He stated (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., Independent Offices Appropriation Bill for 1945 (December 9, 1943), pp. 1083-1087):

"* * * the Commission keeps in mind the fact that working for the Government is a privilege which is extended

Commission infringed his constitutional rights under the First and Fifth Amendments by investigating his political expressions, actions, and affiliations in order to discover whether there was a reasonable doubt as to his loyalty, and also that the standards applied by the Commission in determining his loyalty conflicted with applicable laws. We submit that these contentions are without merit.

(a) Prior to the enactment of the Civil Service Act in 1883, practically all federal employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations (United States Civil Service Commission,

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to citizens of this country, and is not a right. No applicant or appointee can demand that the records before us prove beyond reasonable doubt that he is guilty of some of the accusations made against him. On the contrary, the record must establish that he is a fit person to be entrusted with the duties which devolve upon a public official in time of war.

* * * * *

"No one has questioned the Commission's right to inquire as to whether or not a person is pro-Fascist, pro-Nazi, or pro-Japanese.

"The Commission believes that a member of the Communist party, or a follower of the Communist Party line has clearly indicated that his primary loyalty is to a foreign political group owing its allegiance to a foreign government and that there is, therefore, a strong presumption in favor of his willingness to take steps designed to overthrow our constitutional form of government, if directed so to do. Clearly we are justified in classifying such a person as a potentially disloyal person."

History of the Federal Civil Service (1941)). And although this practice was frequently deplored, it was to our knowledge never held unconstitutional. Nor, indeed was the unconstitutionality of the exercise of the executive power on this basis even suggested.[9] In fact, the cases point in the opposite direction (*In the Matter of Hennen,* 13 Pet. 230; *White* v. *Berry,* 171 U. S. 366; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *United States ex rel. Palmer* v. *Lapp,* 244 Fed. 377, 384–385 (C. C. A. 6)), and it was only the constitutionality of civil service *restrictions* upon the executive's power of appointment which were subject to constitutional doubts (see 13 Op. Atty. Gen. 516).

If the United States Government has the power in time of war to inquire into loyalty at all, and that right is conceded (R. 69), that right has meaning only if the statements and acts of the person under consideration for appointment may be examined, for, as the courts have frequently declared, "loyalty is a matter of the heart and mind." *Ex parte Endo,* 323 U. S. 283, 302; *Hirabayashi* v. *United States,* 320 U. S. 81, 107; *Schurmann* v. *United States,*

[9] It is, of course, common knowledge that many offices and positions in the Federal service, not subject to the Civil Service Act, have traditionally been filled and held by persons of a particular political affiliation without any intimation that this is violative of the fundamental law.

264 Fed. 917, 920 (C. C. A. 9), appeal dismissed, 257 U. S. 621. In no way other than by probing opinions, conduct, and affiliations, political in a broad sense, can doubts as to loyalty ordinarily be resolved. As Wyzanski, D. J., declared in another context, "Saboteurs do not parade with foreign credentials of professional competence." *Von Knorr* v. *Miles,* 60 F. Supp. 962, 970 (D. Mass.), modified on other grounds, 156 F. 2d 287 (C. C. A. 1).

Nor can petitioner successfully claim a deprivation of property without due process of law in contravention of the Fifth Amendment. It is plain that he could not have any "property" in his federal employment, and particularly is this true in the instant case where petitioner had no civil service status but only a conditional appointment. *Love* v. *United States,* 108 F. 2d 43, 45–46 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Ligare* v. *Harries,* 128 F. 2d 582, 583 (C. C. A. 7); *People* v. *Crane,* 214 N. Y. 154, 170, 179–180, affirmed, 239 U. S. 195.

(b) The action of the Commission is not in conflict with the Civil Service Act nor the Hatch Act. While the former provides that no person has the right to use his official authority or influence to coerce the political action of any person, and the latter provides that all persons subject to the Act may express "their opinions on all political subjects," there is nothing in either Act which countenances conduct disloyal to the United States. And here the question is

not one of freedom of political opinion, but whether the course of conduct followed by petitioner indicated a possible loyalty to the Communist party line creating a reasonable doubt as to petitioner's loyalty to the United States.

The attitude of Congress toward Communism is set forth in the Selective Training and Service Act of 1940, c. 720, Section 8 (i), 54 Stat. 885, 892, 50 U. S. C. App. 308 (i), which states that:

> "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

A like attitude is illustrated by the Acts of June 26, 1940, 54 Stat. 611, c. 432, Section 15 (f); July 1, 1941, 55 Stat. 396, c. 266, Section 10 (f); and July 2, 1942, 56 Stat. 634, c. 479, Section 9 (f), which provide that:

> No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution. * * *

We submit that there is no conflict between the course adopted by the Commission and Congressional intent as evidenced by the applicable statutes.

4. Contrary to the contentions of petitioner

(Pet. 30–32) and the United Public Workers of America (Brief for Amicus Curiae, pp. 13–14), the power to provide during the war emergency for "filling positions in the Federal service with qualified persons" and for their retention or dismissal was delegated to the Civil Service Commission, not to the War Manpower Commission or other war agencies. Executive Orders No. 9063 and 9067 (Appendix, *infra*, pp. 22–25) specifically authorized the Civil Service Commission to prescribe regulations with respect to "recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies," and provided that persons appointed under these procedures *"in the discretion of the Civil Service Commission,* may be retained for the duration of the war and for six months thereafter." (Italics provided.)

CONCLUSION

The decision below is correct and there exists no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

APPENDIX

1. Executive Order No. 9063, dated February 16, 1942, provides as follows (7 F. R. 1075):

AUTHORIZING THE CIVIL SERVICE COMMISSION TO ADOPT SPECIAL PROCEDURES RELATING TO RECRUITMENT, PLACEMENT, AND CHANGES IN STATUS OF PERSONNEL FOR THE FEDERAL SERVICE

WHEREAS millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and

WHEREAS it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons;

NOW, THEREFORE, by virtue of the authority vested in me by section 2 of the Civil Service Act (22 Stat. 404), it is hereby ordered as follows:

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal

establishment. The procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and Rules.

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 16, 1942.

2. Executive Order No. 9067, dated February 20, 1942, provides as follows (7 F. R. 1407):

PROVIDING FOR THE TRANSFER OF PERSONNEL TO WAR AGENCIES

By virtue of the authority vested in me by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631), and in order to expedite the transfer of personnel to war agencies, it is hereby ordered as follows:

1. For the purpose of facilitating transfers of employees under the provisions of this Order, the Director of the Bureau of the Budget shall from time to time establish priority classifications of the several Executive departments and agencies, or of parts or activities thereof, in respect to their relative importance to the war program, and such classifications shall be con-

trolling as to transfers under the provisions of this Order.

2. The Civil Service Commission is authorized to secure information as to employees of Executive departments and agencies who are deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employee concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency having a higher priority classification.

3. Whenever a transfer is proposed under the provisions of section 2, it shall become effective not later than 10 days after notification to the department or agency in which the employee is serving. If, within that period, the employing department or agency presents to the Civil Service Commission evidence that its work will be jeopardized by the loss of the employee's services, the Civil Service Commission shall consider such evidence and make a final decision. Transfers to departments and agencies having the same or lower classifications, shall not be effected without the consent of the department or agency in which the employee is serving.

4. Any employee transferred pursuant to this Order shall be entitled to all the reemployment benefits provided by Executive Order No. 8973 [6 F. R. 6420] of December 12, 1941.

5. The Civil Service Commission is authorized to adopt such rules and regulations and to establish such procedures as may be necessary to carry out its responsibilities under this Order. Each Executive department and agency shall promptly fur-

nish the Civil Service Commission such information regarding its employees as the Commission may require for the effectuation of this Order.

6. This Order shall supersede any provisions of Executive Order No. 8973 of December 12, 1941, or of any other Executive Order or Rule of the Civil Service Commission which is in conflict therewith.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 20, 1942.

3. The Civil Service Commission's War Service Regulation II, Section 3, provides as follows:

SEC. 3. *Disqualifications.*—An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons: (a) Dismissal from the service for delinquency or misconduct; (b) physical or mental unfitness for the position for which he applies: *Provided,* that the physical requirements may be waived in the case of any person entitled to disability preference; (c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment; (e) refusal to furnish testimony as required by Civil Service Rule XIV; (f) habitual use of intoxicating beverages to excess; (g) a reasonable doubt as to his loyalty to the Government of the United States; (h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall also be sufficient cause for removal from the service.

4. The Communist Party Line test of loyalty employed by the Civil Service Commission is as follows (89 Cong. Rec. 10254–10255):

> The Commission, on the basis of its experience in handling thousands of these cases, has developed certain policy standards. It is of primary importance to record the fact that the Civil Service Commission will not consider charges against persons who are found merely to possess a progressive interest in seeking changes in the country's economic and political structure but who adhere firmly to the principle that such changes are only to be brought about through orderly democratic processes.
>
> On the other side of the picture, there have evolved certain fairly well-defined categories, where, assuming adequate evidence, a negative conclusion follows. Typical of these latter categories are the following:
>
> Persons who have advocated revolution or the use of force, if necessary, in order to bring about political or economic changes.
>
> Persons whose association with organizations in agreement with the attitudes and policies of the Nazis, Fascists, or Communists, has been such as to indicate sympathy with the programs of the Nazis, Fascists, or Communists.
>
> Persons who have expressed a desire to see the Axis Nations emerge as the victor in the present conflict.
>
> Persons whose record shows that they are more concerned with the success or failure of a foreign government or a foreign political system than with the welfare of the United States Government.

It is clear, of course, that tied up with the last point mentioned above is the whole question of communism. In connection with the handling of these cases, the Commission has issued the following instructions to its staff:

THE COMMUNIST PARTY LINE

A good definition of a Communist is "one who has followed the Communist Party line through one or more changes." The Communist Party line is the policy advocated by the various factions of the Komintern. It is the policy of preserving and protecting the Soviet Union by whatever means are determined by its leaders.

It is not of great importance that the line during the first 10 years of the existence of the Communist Party be intimately known. It is, however, imperative that any person investigating Communist activity should know the last three major line changes. These are set forth below.

REVOLUTIONARY PERIOD 1929 TO 1934

On May 6, 1929, a Communist Party spokesman said: "I think the moment is not far off when a revolutionary crisis will develop in America." From that time on all Communist activity in this country was actively directed toward violent overthrow of this Government. The literature of the party constantly promised the members that the day of reckoning had arrived; "that the shackles of capitalism were to be thrown off and that the decadent capitalist government was to be replaced by a proletarian dictatorship." In order to reduce the masses to the depth of despair necessary to reduce their resistance to armed

revolution, it was essential, in the opinion of the Communists, that the capitalist government refrain from any social changes which might "drug the masses into continued acceptance of the capitalistic system." For this reason the Communists sought to wreck and destroy attempts by the New Deal to pass social legislation. Any person daring to advance such legislation was violently hated by them and branded with the term of contempt "Social Fascist." They included in this category President Roosevelt and the New Deal, John L. Lewis, Norman Thomas and his Socialist Party, and most liberals. They harassed the Socialist Party in its attempt to set up social security and unemployed workers' benefits organizations, and generally attempted to keep the United States in economic chaos. It must be remembered that this period included the worst years of the depression.

COLLECTIVE SECURITY PERIOD DECEMBER 1934 TO AUGUST 1939

In December 1934 Earl Browder returned from a trip to Russia and immediately called a halt to the revolutionary program, and at the same time launched the most effective period of Communist infiltration in this country. This was the Popular Front period. The party made a complete about face. They ceased to apply the term "Social Fascist" to such persons as President Roosevelt, Thomas, and Lewis. They adopted the heroes of the American Revolution as forerunners of American communism. The picture of Abraham Lincoln took its place beside that of Stalin. Where they had previously at-

tacked attempts at social reform they now created a multiplicity of "front" organizations to further such causes. Where they had previously chosen to ignore the rise of fascism in Germany, they now bitterly attacked Hitler and called for a united front of the great democracies—Soviet Russia, Great Britain, China, and the United States—to stop the Mad Dog of Europe. The Daily Worker demanded punitive action against Japan and boycotting of other Axis countries. Where they had previously expressed nothing but hatred toward liberals and other radicals, they now courted these persons assiduously even to the extent of giving a testimonial dinner for Norman Thomas, the arch foe of communism in the years gone by.

COMMUNAZI PERIOD AUGUST 1939 TO JUNE 1941

In August 1939 Russia signed a nonaggression pact with Germany and the Communist Party line made a complete about face. Immediately all preparations for defense were termed by the Communists as warmongering. The British war effort was reviled in the columns of the Daily Worker as an imperialistic war for the perpetuation of capitalist rule.

Communists, through their stooges in the party front organization, violently opposed such defense measures as the conscription bill and the lend-lease bill and extensions of the Monroe Doctrine to the Western Hemisphere as a whole. The Communists allied themselves with other radical peace groups in an attempt to keep America from defending itself and from fighting against Hitler. They spread anti-Yankee imperialist propaganda

throughout South America in an effort to divide the Americas. President Roosevelt was denounced as a warmonger. His defense program was termed an effort to drag the American people into an imperialistic war. All of the familiar and time-worn anti-war arguments were adopted by the Communists. In the youth faction the expression "The Yanks are not coming" became extremely popular. Their war cry became, "No A. E. F., no convoys." While the Communists in America did not openly support Adolph Hitler and the Axis, they revived every device for drawing attention away from the injustice perpetrated by that regime. American Communists and fellow travelers sided with Russia in the war with Finland.

COLLECTIVE SECURITY PERIOD (REVIVED) JUNE 22, 1941, TO DATE

With the attack of Russia by Germany on this date, the Communist Party line over night reverted again to the collective-security phase. Communists began to vie with patriotic Americans in purchasing Defense bonds and volunteering for civilian defense duties. The slogan "The Yanks are not coming," was changed over night to "Stop Hitler Now," and "The Yanks are not coming too late." This is perhaps the most difficult period in which to detect an American Communist.

An earmark of an American Communist today is an advanced degree of patiotism. It is, therefore, difficult to distinguish friend from foe, but it must be remembered that this cloak of patiotism was not donned until June 23, 1941. However, it must also be remembered that many loyal Americans

were sincerely isolationist in viewpoint until the necessity of our participation in the war become increasingly evident. The Communist will try to lead one to think that he is of that category. The fact which gives him away is the suddenness of his switch.

It must be made clear that to identify one as a Communist or a Fellow Traveler (or a sympathizer), it will be necessary to show a following of the above line through one or more changes. Many liberals were taken in by the Communists in the first collective-security period but became aware of the true situation with the change in line occasioned by the signing of the communazi pact in August 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990.

MORTON FRIEDMAN, *Petitioner,*

v.

LEWIS B. SCHWELLENBACH, ET AL., *Respondents.*

BRIEF OF UNITED PUBLIC WORKERS OF AMERICA (CIO) AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

The United Public Workers of America, CIO, is an organization a substantial part of the membership of which is employed by the federal government. The petitioner, Morton Friedman, was a member of the predecessor organization, the United Federal Workers of America, CIO, at the time of the events involved in these proceedings.

The dismissal of Morton Friedman from the federal service is one of many similar cases affecting federal employees, some of whom are members of the United Public

Workers. The Union has an interest in these cases because of the principles that they involve; because of their effect upon the individuals concerned; because of their tendency to demoralize and degrade the federal service; and because they are frequently a cloak for anti-union drives or for the effectuation of racial and religious prejudices.

The United Public Workers of America neither advocates nor approves depriving the Government of the United States of adequate machinery by which persons in the federal service intent upon subverting the Government of the United States may be discovered and discharged, nor does it advocate or approve depriving appointing agencies of the necessary managerial authority to perform this function.

But at the same time, it is the firm opinion of the Union that federal employees are entitled to the same scrupulous regard for their legal rights and civil liberties which the law accords to other citizens. They should not be subject to dismissal except in accordance with law and with orderly process designed to assure fair presentation of the facts and judicious determination of the issues.

The Friedman case and a number of other cases pending before governmental agencies do not involve dismissals as a result of the exercise of the managerial responsibility or discretion of the agency for which the employee works. They involve dismissals over the protest of such agency, in opposition to its judgment, and at the order of the Civil Service Commission acting as an inquisitorial agency. They do not involve dismissals within the principles established by the Congress, but ruthless discharges in violation thereof. They do not involve separations from the federal service on the basis of the evidence of those in a position to know the employee. They involve dismissal in direct contradiction to the judgment and testimony of those who are in a position to appraise the loyalty of the employee.

In the Friedman case, the War Manpower Commission dismissed Friedman at the direction of the Civil Service Commission and solely for the reason, as stated by the War Manpower Commission, that he was "found to be ineligible by the Civil Service Commission (letter of June 5, 1944)." (R. 17). The Commission's "finding" was based entirely upon its conclusion that Mr. Friedman was not eligible for retention in the service because the Commission entertained what is now characterized as a "reasonable doubt as to Mr. Friedman's loyalty." (R. 7-9).[1]

The United Public Workers of America urges this Court to accept jurisdiction in this case for the reasons stated herein and in the petition filed by Morton Friedman. We call the Court's attention to the fact that this suit does not have as its objective a ruling that would require the War Manpower Commission or its successor the Labor Department to retain Mr. Friedman indefinitely in its employ against its own judgment. In substance, the suit seeks (1) a ruling that Friedman's dismissal solely because of the finding of the Civil Service Commission that it entertained "a reasonable doubt as to his loyalty" was in violation of law; (2) a restoration of Mr. Friedman's status prior to the illegal direction of the Civil Service Commission; and (3) an injunction to prevent the Civil Service Commission from interfering with the War Manpower Commission's exercise of its own managerial discretion within the limits of law.

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[1] The Commission's final letter ordering dismissal merely stated that Friedman was ineligible "according to standards observed by the Commission." The standards were not specified. Its original letter ordering dismissal merely stated that the Commission "has reached the conclusion that the best interests of the Government would be served by terminating Mr. Friedman's employment" (R. 54). It was only in its answer in the instant case that the government raised the argument that the dismissal was pursuant to the Commission's regulation prescribing reasonable doubt as to loyalty as a ground for separation.

I.

The Importance of the Issue.

Morton Friedman was dismissed by order of the Civil Service Commission from the federal service on the grounds that there was "reasonable doubt as to his loyalty." The alleged doubt was not entertained by the War Manpower Commission or the Office for Emergency Management which had hired Mr. Friedman and for which he was working to their complete satisfaction. Nor had his loyalty been questioned by any previous employing agency of the government—which he had served for nine years. The doubt existed only in the minds of commissioners of the Civil Service Commission. The doubt did not exist even in the minds of the members of the Civil Service Commission's own Board of Appeals and Review, which recommended Mr. Friedman's exoneration.

According to the Civil Service Commission, the basis for its "reasonable doubt" was, first, that Mr. Friedman, like Chester Bowles[2] and thousands of other Americans, opposed participation by the United States in the last war until after the German invasion of the Soviet Union; and also because Mr. Friedman, like thousands of other Americans, joined the American Peace Mobilization which opposed American participation in the war.

Neither the basic nor the technical issues presented by this case have been passed upon by this Court. Technically, the issues involved are (1) construction of the applicable laws to determine whether the Civil Service Commission has jurisdiction to require an agency of Government,

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[2] See his statement (PM Sunday Magazine, October 20, 1946, p. 16):

> "Until 1941 I thought of it (Hitlerism) as a passing phase, a local middle-European phenomenon, a bad answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old-world powers."

against its will, to discharge an employee after nine years of service, on the ground that the Civil Service Commission has a "reasonable doubt as to his loyalty"; (2) if the Civil Service Commission has such jurisdiction, can it lawfully prescribe a standard as vague and general as the "reasonable doubt" test; and (3) is the "reasonable doubt" test invalid in view of its conflict with clear legislation of the Congress on the subject of the standard of loyalty of federal employees and with the constitutional guarantees of the First Amendment.

In broader perspective, the issues presented by the case of Morton Friedman raise questions of fundamental importance to the Government of the United States and to our democratic society. We believe that it is essential that this Court define the limits of jurisdiction and permissible action within which freedom of speech and thought may be curtailed in the real or supposed interests of governmental administration. This is important not merely because of the individuals involved, but fundamentally because the employees of the Government are a group of men and women who are vital to the well-being of this nation. If they can be dismissed on the basis of the personal predilection of a Commission by which they are not employed and the conduct of which is not regulated by any intelligible, objective standard, only persons who are thorough conformists with the prevailing views of the moment will accept or remain in Government employment. And those unfortunates who are in Government service under such conditions will live in constant terror lest a thought, an idea or belief creep into their minds which is not patterned upon the thoughts and prejudices of those who happen to be Civil Service Commissioners.

In addition, violations of the civil rights of its employees by the federal Government have a profound effect upon the nation as a whole. Witch hunts in the governmental offices of Washington, highly publicized as they are, are followed by witch hunts throughout the country from East

Coast to West. If the solemn processes of government are used to inspire and carry out the summary destruction of careers and reputations because a "reasonable doubt as to loyalty" exists in the minds of three officials, stubbornly opposed to the opinion of those who are intimately familiar with the person concerned, we can only expect that private persons in their private lives will be encouraged and heartened in a similar ruthless extirpation of individuals whose thoughts and beliefs happen to differ from those which are in vogue.

II.

The Basic Provisions of Law.

Federal employees are hired and discharged pursuant to express and detailed provisions of law. Friedman was a "war service" appointee. He could be separated from service by the War Manpower Commission whenever it chose, provided that in so doing it did not violate an express provision of law. But he could not be discharged by the Civil Service Commission at all, as we shall point out (pp. 13-14 *infra*). And he could not be discharged even by the War Manpower Commission (or any other agency or official) for reasons expressly prohibited by law. He could not, for example, be discharged for failure to make a political contribution (Civil Service Act, Section 2 Fifth, 5 USC § 633). And he could not be dismissed because he was a Negro, Jew, Catholic or Protestant (Executive Order No. 8587, November 7, 1940 CFR Cum. Supp. 1943, Book 2, p. 1439); or because he voted for Republican, Democratic, or Socialist candidates (Hatch Act, § 9(a), 18 USC § 61h). He could not be dismissed because of any expression of "opinions on all political subjects and candidates." (Hatch Act § 9(a), *supra*). He could not be dismissed for political affiliations "except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment." (Executive Order No. 8587, *supra*).

Congress has expressly provided, on the other hand, that any person shall immediately be removed from office if he has membership in "any political party or organization which advocates the overthrow of our constitutional form of government in the United States." (Hatch Act, §9A, 18 USC §61i). It has also provided in appropriation statutes that employees who advocate the overthrow of the Government or who belong to organizations advocating such overthrow, cannot be paid from federal funds. (See e.g. riders cited in note 2 of the opinion in *United States* v. *Lovett*, 66 Sup. Ct. 1073 at 1075).

It is not contended that Friedman was subject to these statutory disqualifications. He was dismissed under a "regulation" of the Civil Service Commission which provided that "a reasonable doubt as to his (an employee's) loyalty to the Government of the United States" . . . "shall be sufficient cause for removal from the service." (Civil Service Commission Departmental Circular No. 323, February 28, 1942).

As we discuss in the following points, the Commission had no authority to issue this regulation; even if it had authority, the regulation is too vague and general to be valid; and it is in conflict with constitutional and statutory provisions.

III.

ARGUMENT.

1. The Civil Service Commission Has No Jurisdiction to Require by Regulation the Dismissal of a Federal Employee on the Grounds that the Commission Has a "Reasonable Doubt as to (his) Loyalty."

(a) *The President Did Not and Could Not Delegate to the Civil Service Commission the Authority to Make this Regulation.*

The Civil Service Commission is an agency of limited authority. This authority is defined by statute and executive order.

The Commission's regulation in issue in this case was not promulgated pursuant to statute. It was announced "pursuant to the authority conferred by Executive Order 9063, of February 16, 1942, and 9067 of February 20, 1942." 7 F. R. 1075 No. 35 and 7 F. R. 1407 No. 38.

By the Executive Orders cited above the President did purport to delegate to the Commission certain rule making power. *But this delegation was strictly limited and defined by the Orders.* It was not a general, all-inclusive delegation of presidential powers to the Commission.

Executive Order 9063 purported to delegate to the Commission only the power to prescribe "special procedures and regulations in connection with the recruitment, placement, and changes in status of personnel . . ." It is clear from the context and purpose of the Order that these were to be merely procedural, and that their purpose was not substantive but expediting: to avoid delay. The entire preamble of the Order reads as follows:

> "Whereas millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and
>
> "Whereas it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons;"

It was for this precise and limited purpose that the Commission was authorized:

> "To adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal establishment."

Executive Order 9067 may be briefly disposed of. It merely prescribed a special procedure for transfer of personnel and authorized the Commission to carry it out.

The mere reading of these Orders shows that the President did not intend to clothe the Commission with the crucial power to adopt a substantive rule qualifying if not negating statutory guarantees of freedom of political opinion and action, and prescribing a broad test of loyalty.

And, indeed, even if the President had power to delegate to the Commission the function of making incidental procedural or expediting regulations, he certainly had no power to delegate substantive rule-making jurisdiction. In both of the Orders cited, the President purported to act solely under section 2 of the Civil Service Act. But that Act vests the rule-making power exclusively in the President. It gives the Commission no power to prescribe rules. 5 U. S. C. 633. And never since the enactment of the Civil Service Act in 1883 did either a President or a Commission presume that the Act authorized the delegation of substantive rule-making power to the Commission. So we urge that it is clear the President had no authority to delegate rule-making power. And the power he did purport to delegate did not authorize the Commission to adopt substantive rules. Certainly, the Commission had no basis for presuming that the delegation authorized it to introduce a novel and revolutionary type of regulation in the field of freedom of thought.

The issue at this juncture, therefore, comes to this: Assuming that the President had authority to delegate to the Commission some of his functions under the Civil Service Act, just what did he delegate? We submit that it is clear that he at most was authorized to delegate and did in fact delegate merely authority to prescribe "special" or incidental procedural or expediting procedures and regulations so that "there be no delay during the present emergency in filling positions." The Commission was to prescribe "special" procedures. It was not to write a new code. It was not to assume the role of thought police. It was not to leg-

islate a loyalty test for all federal employees (except those in the field service of the postal establishment).

(b) *The Civil Service Act Does Not Authorize Even the President to Prescribe a "Loyalty" Test.*

More than this, even if the President had been authorized to and had purported to vest the Commission with all of his power under the Act, it would still have been unable to prescribe a "loyalty" test. That Act does not itself prescribe such a test, nor does it vest jurisdiction in the President so to do. Its only reference to political opinion is a *prohibition* against using official authority to coerce political action. Section 2, Sixth, 5 U. S. C. § 633. The Act provides in general terms that the President shall issue rules providing for "open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder." The examinations are required to relate to "relative capacity and fitness . . . to discharge the duties of the service . . ." (Section 2, First).

We believe it is clear from the context of the law that "fitness" as used in this provision, refers to qualification for the job in terms of physical and mental qualifications and moral character. It is significant to note that for 59 years the President and the Commission apparently so considered. The Act was passed in 1883 and the first "loyalty" regulation was adopted in 1942. It is also significant that, as we discuss below, Congress acted independently on the subject.

(c) *If it be assumed that there was a delegation to the Commission to prescribe a "loyalty" test, that delegation is invalid for want of proper legislative standard.*

If it were open to the courts in the face of the meaning of the statute and of the administrative and legislative history, to infer that the Civil Service Act or the Orders cited did authorize the prescription of a test of political opinion, we submit that the court should not do so. The investment of an executive agency with power to regulate political

opinion is a serious and dangerous act. It should be done, if at all, only by the deliberate act of Congress after careful debate and subject to meticulous standards set by the Congress. It should not be the product of inference from a word in a statute or regulation. If express delegation of power is required in any field; if a meticulous prescription of standards is anywhere to be required, it should be here: in the sacred, delicate field of free speech and thought and political expression.

We submit that power to legislate or regulate in a field so zealously safeguarded as that of freedom of speech and opinion is not to be attributed to an executive agency except on the basis of clear, specific and unmistakable authority and subject to precise standards. It is not to be assumed, and it is not to be inferred from general language as to recruitment jurisdiction or procedure. And if its existence should be inferred in this case, the power must be held invalid for lack of adequate standards.

The political test prescribed here is a vivid illustration of the vice of an uncontrolled "roving commission" to police political thought. The ground of disqualification adopted was a "reasonable doubt as to loyalty to the Government of the United States." The regulation does not even specify whose "doubt" is required, and the instant case shows the confusion which exists as to this. And the test itself raises a standard so vague and indefinite that into it may be read the individual prejudices of the Commissioners of the Civil Service Commission. The Friedman case graphically shows that the standard is so vague as to mean whatever an administrative agency desires it to mean. For on the identical facts in the identical record Friedman is adjudged loyal by his employing agency and by the Commission's Board of Appeals and Review and his loyalty doubted only by the Civil Service Commissioners themselves.

We respectfully submit, therefore, that there is no basis in law for the Civil Service Commission to legislate a "loyalty" test; and that, in any event, the test prescribed is unconstitutional because it was adopted in the absence of

standards and it is dangerously and fatally vague and general. Free commerce in opinion and political expression are entitled to at least the safeguards provided for free trade in live chickens. Freedom of thought and political expression is entitled to as much protection as the business of slaughtering fowl. *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495. In neither case may "unfettered discretion" be constitutionally exercised.

2. Even if the Civil Service Commission Has Power to Legislate on the Subject of Loyalty and to Require Dismissal, Its Regulation is Invalid in View of Congressional and Constitutional Provisions.

If any inquiry into loyalty by the Civil Service Commission is proper, it should be an inquiry in accordance with congressional standards. Congress has considered the matter of loyalty of employees at great length (see *United States* v. *Lovett,* 66 Sup. Ct. 1073, 1075). As a result it adopted the specific standard contained in the Hatch Act and the Appropriations riders mentioned above, i. e., disqualification of persons advocating the overthrow of the Government or belonging to organizations which advocate such overthrow. From the exhaustive congressional consideration, it is clear that the Congress assumed that it had legislated as far in a field dealing with freedom of speech and opinion as it deemed desirable and that there is no warrant for administrative extension of the congressional standards.

If it should be assumed that the Commission had power to adopt a regulation as to opinion and loyalty qualifications in the absence of clear and explicit statutory language, that regulatory power must be restricted to the prescribing of specifications to the Congressional standard. Yet the Civil Service Commission adopted a regulation going far beyond the congressional standard, and substituting a subjective for the objective congressional test. In doing so it exceeded its powers, and breached the guaranty of the first

amendment to the Constitution and specifically, it violated the guarantees of freedom and speech and opinion granted to Government employees by the Civil Service Act, Section 2 Fifth and Sixth, the Hatch Act, Section 9(a), and the executive order constituting Rule I, Section 2 of the Civil Service Rules. (Supra, p. 6)

3. The Action of the Civil Service Commission Deprives the Appointing Agency of Its Legal Authority Over Its Own Personnel.

The Court below refused to entertain jurisdiction of the matter because of its fear that it would be reviewing "managerial acts" and interfering "with the executive departments in the performance of their ordinary duties." (R. 76). This consideration is, of course, irrelevant if as we contend the Commission was without legal power to take the action that it did. But we have not asked the Court to reverse a "managerial act." What we are asking the Court to do is to permit the War Manpower Commission to perform its managerial acts without interference. The managerial responsibilities were in the War Manpower Commission and, after thorough investigation (R. 32, 33), it exercised those responsibilities by determining that petitioner was loyal and should be retained. It was the Civil Service Commission, having no managerial responsibilities, which interfered with an executive department in the performance of its ordinary duties. We urge not interference with managerial discretion, but an opportunity for free exercise of that discretion and a termination of the disorderly, oppres sive, and unlawful interference of the Civil Service Commission.

Nothing in statute or executive order gives the Civil Service Commission the authority it exercised here. The mere indication by the Civil Service Commission that it is certifying an employee "subject to character investigation" does not deprive the employing agency of its responsibilities for determining whether to retain or dismiss its

employees. Nor can it be held to make the doubts of the Civil Service Commission controlling, against the certainty of the employing agency that the employee is loyal. Not even the Commission's own regulations say that the "doubt" must be that of the Commission instead of the employing agency. The Civil Service Commission's authority to screen appointments cannot be extended to control dismissals of employees not its own without violating the basic principles of our system of executive responsibility. Cf. *Myers* v. *United States*, 272 U. S. 52.

IV.

CONCLUSION.

For the foregoing reasons and for the reasons set forth in the Petition, with which we are in general agreement, we respectfully urge that this Court grant the writ of certiorari.

Respectfully submitted,

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February, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN,

Petitioner,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia

PETITION FOR REHEARING

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Petitioner,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia

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PETITION FOR REHEARING

We respectfully urge the Court to take cognizance of the great importance of this case, both as it affects petitioner and in its implications for the Civil Service as a whole. Events which have occurred since the decision of this Court denying the petition for a writ of certiorari have emphasized the significance of the issues here presented.

The petitioner was discharged from his Government post on the instruction of the Civil Service Commission based

upon what it termed "reasonable doubt as to his loyalty" (R. 50-51). His two employing agencies, however, both prominent in the war effort, were satisfied as to his loyalty and exercised their best efforts to retain him (R. 31-33, 38). The Commission's Board of Appeals and Review recommended his exoneration (R. 32) and he was permitted to retain his post during proceedings on his case for nearly two years after the Commission had decided that his dismissal was called for (R. 50-52).

The Commission's doubt arose, according to its letter to petitioner, because he opposed American participation in the war against Germany until some time after Russia's belligerency, and because he was an active member of an organization called the American Peace Mobilization, which was similarly opposed to American involvement (R. 75-76, n. 2).

The dismissal was thus based on petitioner's opinions on a political issue then current, and on his affiliation with an organization espousing those views. While the Commission characterized the organization as "Communist-dominated", it did not allege it to be unlawful or to advocate the overthrow of the Government. As to the petitioner individually, he was not charged with being a member of the Communist Party, and the Government in its answer specifically "admit(ted) that * * * (petitioner) was not charged with having violated any of the provisions of The Hatch Act" (R. 23), which is the statute that prohibits Federal employment of persons having membership in organizations advocating the overthrow of the Government. Section 9A(1), 53 Stat. 1148, 18 U. S. C. § 61(i)(1).

The case raises in an acute form several issues of great importance to the civil service. These involve, among others, the propriety of the standards utilized for the testing of so-called loyalty of Government employees; the applicability to such employees, as a special class, of the doctrine of guilt by association; the denial to them of

certain of the basic requirements of procedural due process; and the availability of judicial review to enforce the statutory rights of Federal employees to political freedom. These questions, and others raised by the case, have never before been reviewed by this Court and are, we submit, of obvious importance.

If any evidence of this fact is needed in addition to what has already been presented to the Court, it is supplied by Executive Order No. 9835, March 21, 1947, 12 Fed. Register 1935. Issued within a week after the denial of certiorari in this case and broadly assumed to secure its sanction from this action of the Court, the Executive Order sets forth an elaborate permanent mechanism for adjudicating what is characterized as disloyalty in Federal employees numbering over 2,000,000 and in all applicants for Federal employment. The problems raised by this case are in many respects paralleled by the Executive Order, which therefore emphasizes the need for a decision by this Court on the issues here presented.

In a section headed "Standards", the Executive Order sets up, among the "activities and associations" which may be considered in passing on loyalty, conduct which on its face is criminal, including sabotage, espionage, treason and sedition; conduct which is already ground for dismissal, such as advocacy of forceful or violent revolution; and finally,

> "membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, Fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means".

The standards set up in this provision are broad and undefined. They embody into law all the vices of guilt by imputation. The term "sympathetic association", for example, is susceptible of an infinite number of meanings.* So, too, are the terms "totalitarian, Fascist, Communist or subversive", which by frequent and indiscriminate usage have come to be the stock language of political abuse, rather than proper standards for quasi-judicial determinations of loyalty. The method of determining guilt by association and the use of political cliches to test loyalty involved in petitioner's dismissal have now been embodied as an addition to the laws governing the civil service by the Executive Order. Review of the standards adopted in this case is warranted by the probability of their widespread application.

Under other provisions of the Order, the employee whose loyalty is questioned is not entitled to the right of confrontation or of examination of his accusers (II, 2, A and B); their identity may be withheld from him and even from the head of his employing agency (IV, 1 and 2); he may not challenge the designation applied to an organization by the Attorney General; and, if so-called "security considerations" exist, need not even be given a specific statement of the charges against him (II, 2, 8). In the present case too, no evidence was presented against petitioner. As stated without dispute in the affidavit in support of his motion for summary judgment (R. 37),

> "The case against him (petitioner) was based entirely upon an investigator's report, never read or shown to deponent, but which is kept in the secret files of the Civil Service Commission and consists entirely of alleged statements of anonymous and unsworn witnesses. At this hearing, the Chairman of the said

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* "Washington Witch-hunt", by Henry Steele Commager, The Nation, Apr. 5, 1947.

> Board of Appeals and Review (of the Civil Service Commission) stated on the record:
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> 'Incidentally, we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation.' "

Similarly, although the alleged character of the American Peace Mobilization loomed large in the Commission's finding of petitioner's doubtful loyalty, nowhere was any evidence presented as to that organization which petitioner could controvert.

Review is warranted on another important ground. The opinion below stated that review of the findings of the Civil Service Commission that led to petitioner's dismissal —an executive managerial matter—was beyond the province of the judiciary (R. 76). In our petition for certiorari (p. 27), we expressed the view that this holding, in the light of the violations of petitioner's substantive and procedural rights, was in conflict with the decision of this Court in *United States* v. *Wickersham*, 201 U. S. 390, where minute inquiry was made into the legality of a dismissal of a Federal employee. Failure to review the decision below means that in the ominous situation in which Federal employees now find themselves, under the virtually unlimited scope of the Executive Order, dismissals on whatever ground are immune from judicial scrutiny, so long as the severances are accompanied by appropriate incantations of the disloyalty formula. Thus the entire body of statutory law protecting the political freedom of Federal employees (Civil Service Act, Sec. 2, 22 Stat. 403, 5 U. S. C. § 633; Hatch Act, Sec. 9(a), 53 Stat. 1148, 18 U. S. C. § 61h) becomes unenforceable. We do not believe that this is the law. But whether or not it is, we submit that the question of the availability of judicial remedies to correct denials of substantive and procedural rights supposedly guaran-

teed by statute to Federal employees, is of sufficient importance, both to petitioner, the present civil service, and all potential civil servants, to warrant the judgment of this Court on the issue.

In *West Virginia* v. *Barnette,* 319 U. S. 624, at 642, the Court said:

> "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. * * * If there are any circumstances which permit an exception, they do not occur to us."

If an official prescription of orthodoxy is ever to be imposed in this country, it would be naive to expect it in the simple form of an edict to all to think certain thoughts or not to think others. The command will undoubtedly have a surface plausibility in an effort to give it the semblance of conformity to legal norms. A question presented by this case is whether the test of loyalty here applied is in fact an official prescription of orthodoxy. And because the standard sustained by the court below is likely to be put to expanded use as a result of the Executive Order, we submit that the authoritative judgment of this Court on the point is most vital.

The denial of the petition for certiorari in this case has been widely interpreted as sanctioning the Executive Order here described. This Order is, of course, not here in issue. But the problems here involved are related, and we respectfully submit are so important in their implications that the views of this Court should not be permitted to be inferred from a decision on a petition for certiorari. It may be that petitioner errs in his views of his rights. The questions involved in this case, however, have assumed such great proportions that they call for a definitive expression by this Court.

We respectfully request a rehearing on our petition for certiorari and pray that, on rehearing, the writ issue.

Dated: April 11, 1947.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

April 11, 1947.

MORTON STAVIS
SIDNEY V. SMITH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 990.

MORTON FRIEDMAN, *Petitioner,*

v.

LEWIS B. SCHWELLENBACH, ET AL., *Respondents.*

STATEMENT OF UNITED PUBLIC WORKERS OF AMERICA (CIO) AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

The United Public Workers of America (CIO) urges the Court to reconsider its denial of certiorari in the above-entitled matter and to grant the writ. As pointed out in our brief amicus curiae, Friedman was dismissed from the federal service and branded as disqualified for public service because the Civil Service Commission had a "reasonable doubt as to his loyalty." It is not claimed that he was a member of the Communist Party and the Government specifically admitted that he was not charged with membership in an organization advocating the overthrow of the Government. He was persecuted solely because of past opinions as to our participation in the war, which are *now* suspect—

although at the time he held them they were widely shared by persons of undoubted repute. This was coupled with membership for a time in an organization designated by the Civil Service Commission as "Communist dominated" although its activities are not charged to be unlawful or directed to subversion of our Government. There is no evidence of this alleged domination or that Friedman knew of it, if it were the fact. The case thus presents the issue of punishment for political opinions and the extreme application of the doctrine of guilt by imputation.

It is possible that this Court's denial of certiorari involved an assumption that the procedure and standard involved in the instant case were transitory wartime phenomena. It has now become clear that the case involves studied and permanent Government policy (Exec. Order 9835, March 21, 1947, Fed. Reg. March 25, 1947) which we assert to be an illegal and unconstitutional assault upon the liberty of opinion of public officials—a class whose freedom of opinion is most vital to the preservation of our nation. This Court's denial of certiorari has been the spring which has released a devastating and destructive attack upon fundamental values of our society.

The Friedman case confronts this Court with the duty to reassert the doctrine that dismissal of Government officials on the basis of "loyalty" standards is subject to judicial review, and presents it with the opportunity to restate and to apply to existing circumstances the constitutional and statutory doctrines relating thereto which are the foundation of our democracy. We feel it our duty as members of this bar to say bluntly to this Court that if it fails to review the Friedman case, it will have sanctioned by default a terrible assault upon the liberties of the American people. The first object of this assault is the personnel of Government.

The ruthless extermination of freedom of opinion and the forceful suppression of unorthodox thought and position among these people who make and execute government policy is profoundly serious. Government policy is and

should be the result of the free play of ideas and the frank interchange of diverse opinions among those in the executive as well as the legislative branch of the Government. It is from this diversity of ideas that sound and effective Government policy is distilled. The effect of action such as that in the Friedman case and the Governmental measures taken following this Court's action is to classify an enormous although vague and undefined segment of opinion and idea as taboo. He who entertains opinions or expresses ideas in the vast part of the spectrum left of center must live in mute fear. His unorthodoxy—however slight it may be—if detected or even suspected, now exposes him to the mercies of a spy system and the penalty of being branded forever as disloyal. Nor, as the Friedman case illustrates, is there a locus penitentiae; for a federal employee who has once dared to adhere to an unorthodox opinion may later embrace reaction; but even if he should later become persuaded that anything left of reaction is un-American, he could not be purged of the sin of Jeffersonianism, disagreement with our policy towards Greece, Turkey, or Soviet Russia, or whatever dangerous form of "radicalism" he may once have embraced.

But this assault on freedom of opinion will not stop with Government employees. Assaults upon freedom have a habit of growing beyond a stated objective. They quickly attack not merely a manifestation, but freedom itself. So this crusade, once under way, will not stop with its victims in the federal service. It will spread and is now spreading over this country, blighting our democracy and bringing fear and distrust to American homes throughout the nation. This nation is founded upon the principle that diversity and unorthodoxy are the fertile soil of democratic society; and that, in the words of this Court (*West Virginia* v. *Barnette*, 319 U. S. 624 at 642), "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Neither the Civil Service Commission, the Attorney General nor the President himself should be excepted from this prohibition.

Counsel realize that it is comparatively unusual for this Court to reconsider an order denying certiorari. But this, we respectfully submit, is an unusual situation; an emergency as great in our political and spiritual life as was the coal miners' strike in our economic affairs. A denial of certiorari in this case is a decision that the executive branch of the Government may, unbridled and unguided, launch this country upon a course of action which threatens to destroy our form of Government and our basic liberties. The danger in fact is that without the guidance of this Court and the assurance that it stands guard, a drive to eliminate Communism from our national life will itself become a more imminent threat to our democracy than is Communism itself.

For the reasons stated above and for the reasons stated in the petition for rehearing filed on behalf of Morton Friedman, we respectfully join in the request for a rehearing of the petition for certiorari and pray that upon rehearing the writ issue.

Respectfully submitted,

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April, 1947.